Pre. B. 52.
Bla. 108.
[illegible] 411.
Kirb. 369.

The ancient Eng.^d Statutes have the same kind of authority here as the Com. Law of Eng.

The distinction between public & private stat.^s is not altogether so important to observe in this State as in Eng.^d since both public & private stat.^s

+ Vid. 248.

may in pleading [4 & 76.] be given in evidence under the gen.^l issue & need not be specially pleaded. [An Eng. private stat. must be pleaded. [illegible] 76. [illegible] 57.] There is however this difference between them in C: Com. in defend under a public stat. without reading it on the gen.^l issue — a private stat. must be read in such a case. And in all cases [illegible] in Eng.^d in which an action is brought on a private stat. it is indispensably necessary to declare on the stat. It will not suffice [illegible] on giving the stat. in evidence.

Hop. 76.
Swift.
15. 4.
[illegible] 35
[illegible] 20.
[illegible]
[illegible] 34.

The distinction between public & private [illegible] [illegible] defined. [illegible] restrictions [illegible] private [illegible] a private [illegible] restrictions [illegible] public — the restrictions [illegible] [illegible] public: the restrictions [illegible] If however in any of these [illegible] [Swift. 420. [illegible]] [illegible] [illegible] would be considered [illegible]

[illegible] 5 [illegible] [illegible] 410. [illegible] 331. Hob. 72. [illegible] been conformable to [illegible] Eng.^d [illegible]

[illegible]

[illegible] Law
3. [illegible]
+ B
1 Bl. Com.
89.
10 [illegible] 101.

not a [illegible] Com. Law, [illegible] [illegible] [illegible] affirmative [illegible] necessary [illegible] a repeal of the Com. Law [illegible] notice [illegible] [illegible]

2 Lib. [illegible] the former is
[illegible] latter. [illegible] suppose [illegible]
Crow. [illegible] in [illegible] in which there was an antecedent Com.
[illegible] law remedy: But [illegible] no Com. law-remedy, the
[illegible] former is repealed by the latter, tho' both are affirmative.

2d inf. When there is an existing remedy at Com. law, and [illegible]
that, [illegible] same time; it is necessary for a plf. who brings
[illegible] 84 an action on the St. to declare whom it [illegible] public:
[illegible] 230. [illegible] 154.
Otherwise, it would not be known from the declaration
which remedy he intended to pursue. 3 Bac. 816. 2 Hawk. ch. 25. § 110.

In some cases in which Stat. have declared cer=
[illegible] tain acts "void" Cts. have adjudged them voidable [illegible].
It is said that where the Stat. declares an act void to
all intents & purposes, it must be adjudged void: But
Bl. 17. Co. L. 207. Co. 59. b. T. R. 606. that where the act is declared "void," only, it may be
adjudged voidable. — [illegible] supposes the true rule to
be this: that if the object of the St. would be defeated
by the act's being considered voidable only, it must
be adjudged void: But otherwise, that it may be ad-
judged voidable. And that the words "to all intents
[illegible] have no certain operation.

[illegible] must recite the St. sufficiently
[illegible] action on [illegible] — [illegible]
[illegible] (4 Rob. 70. — 2 [illegible] 57) [illegible]
[illegible] need not count upon [illegible];
[illegible] need not allege that the wrong [illegible] declar.n, contra formam
statuti. (Pro. El. 601.) [illegible]
[illegible] 4 Bac. 18. [illegible] prohibits an act or [illegible] no remedy, or [illegible]
Hawk. 382. [illegible] where a [illegible] a remedy [illegible]
[illegible] in which there was no remedy before [illegible]
[illegible] 4 Bac. 656. [illegible]
[illegible] in favor of [illegible] counting on the St. is not necessary. — [illegible]
[illegible] injured, or [illegible] informer, counting [illegible]
[illegible] necessary in all cases in which [illegible]
covered. [illegible] more than single [illegible]
[illegible] counting on the St. [illegible] contra [illegible]
[illegible]
[illegible] 12 Mod. 540. 4 Bac. 656. 119. [illegible] [illegible]

Notes taken from Mr. Reeve's Lectures.

3. The Civil Law, so far as it is adopted in England, derives all the efficacy, which it has in that kingdome, from its incorporation with the written or unwritten Law of the realm. The maxims of the Civil Law, when adopted by the King's courts in such a series of adjudications, as is sufficient to form, to establish what is called the Law of precedent, virtually become a part of the common law itself. In the same manner, when the rules of the Civil Law, are adopted & sanctioned by Parliament, they are transformed into parts of the statute-law of England.

The common & statute Law of England, before they require any authority in the United States, require a similar sanction. They may be adopted or rejected by our courts, or by a legislature, as they are conformable or repugnant to the rules of moral right, or as they are applicable or inapplicable to the particular circumstances of our country. And they become a part of our statute, or common law, as they are sanctioned by legislative or judicial authority.

On Statutes.

A Statute does not, by giving a new remedy, annihilate that, which before existed at Common law, unless the remedy thus given be more limited than that, which the Common law afforded.

But where a Statute thus prescribes a peculiar remedy that might have been before obtained, it is construed as tacitly abrogating the greater. Where both the Statute & Common law offer different & distinct remedies, either may be pursued, except in the instance before mentioned by the parties respecting. And if the Plaintiff, when thus entitled to one of two existing remedies, should pursue by legal steps that, which the Statute offers, & fail; he might still, in the same suit, resort to the Common law remedy & recover. But if the Statute remedy be pursued, it is necessary to declare upon the Statute. Yet

Of a remedy created by Statute, in any case in which none existed at Common law, the Statute, & the Statute alone, must be the guide. The remedy, requires a due course of proceedings unknown to the Common law, the Statute must be alone pursued.

But if a Statute imposes a new duty, & gives no remedy, or gives a remedy in a peculiar manner, the Common law will lend its aid, & afford a remedy. In this case the offender may be punished for a misdemeanor; as having violated the salutary regulations of society. But when a Statute, which renders illegal any act or omission which at Common law was not so, does give a remedy; no other remedy than that afforded by the Statute, can be obtained. Where a remedy is given by Statute in derogation of the Common law, it is strictly construed.

It is not true, that all Statutes, for the advancement of the Common law, or to the ease of it, are void. This principle, if conceived in its whole extent, is

2 Vol. Ab. 463. 3 Ab. 309. 11. 2 Ro. Cas. 424. Sid. 310.

of Great Britain, if no hand be found for the commencement of a statute's operation, it is considered as binding from the first day of that session of that parliament in which it is enacted. This rule must necessarily operate, in most cases, as an ex post facto law; but such must operate great injustice, especially as it affects offences against positive law. The time, at which a statute commences its operation in this state, appears not to be fixed by any uniform or determinate rule. Justice, however, would require that all, who may be affected by the operation of a law, should have the means of knowing its existence, before they are subjected to its penalties. This rule has been adopted by our ct.

1 Burr. 125. 7 T.R. 257. * as an action lies for a malicious prosecution, but not for a malicious arrest or holding to bail in a civil action. 4 T.R. 657. Cowp. 382. 2 Str. 1203. 4 T.R. 758. 2 Str. 1203. 4 T.R. 758. accord. 2 H. Bl. 254. Comyns. 1. 4. a civil action lies. Bac. Abr. Tit. Actions. 233. 3 T.R. 448. Salk. 221. 3 Bl. Comm. 5. 88.

Of the construction of statutes.

Statutes, giving greater remedies than the rules of natural justice would require, are denominated penal. The general rule with regard to the construction of penal & remedial statutes, is, That the former be strictly, & the latter liberally construed. By this rule 4 Bac. Abr. 641. 3 Co. 7. Salk. 683. repugnant to the strict & liberal construction of statutes, is meant, that, in one case, the literal meaning of the law, & in the other the intentions of the legislature, collected from reasonable intimations, shall be observed. From this rule however the courts of Westminster have on many instances, widely deviated. 2 Rena. 86. 6 Co. Car. 71. 1 Mod. 282. 4 Bac. Abr. 641. 3 Co. 7. Salk. 683. 2 Ro. Cas. 71. 6 Co. Car. 71. 1 Mod. 282.

4 Where a person who has been convicted of a crime is subjected to an additional penalty, in which case it becomes necessary to prove a former offence, similar to that of which he is indicted; this requisite proof can be afforded only by a former record of conviction. No other testimony than that of a record is admissible. In this case, the highest proof the evidence is literally necessary: In most, or all, other instances, the highest testimony of which the nature of the case will admit, is received....

Some penal Statutes are also remedial. With regard to these the practice has been to relax rigidity the rule of strict construction, where the protection of the subject is sought to be enforced; but where the redress sought is the prosecutor in his own behalf, this rule obtains in its full force & others, and has not been sufficient to have passed.— In remedial cases words cannot be taken in their strict sense.

Any universality of expression with respect to persons, is not construed to comprehend those who by reason of legal incapacity, are already exempted from laws similar in nature, operation, to that or Statute in which such universality of terms is used to be employed. Thus in penal Statutes the words "All persons" do not embrace infants lunatics &c. &c. Statute enabling all persons "to dispose of hereditaments in a particular mode of conveyance, is not to extend to those persons who were before unable to convey the same property, by methods then lawful.

5th Persons capable of prosecuting on penal Statutes

If an offence directly & equally affects the individuals of community, by infringing its peace, no person or his private capacity can prosecute the offender for the public injury. Though if by such public offence any individual suffers a special injury; he may

may sue for his own private redress. If an offence affects an individual only, he only shall pursue the remedy. When an individual sues for redress of a private injury suffered from a public offence,

4. Bac. O.5 3.10. 2c. 75.6. he may offer the penal statute in evidence on his own prosecution. (1 Com. 229. 239.) If a penal statute affords a remedy to both the public & the individual; the public penalty is inflicted, of course upon conviction by individual. In qui tam actions if the individual prosecuting, withdraw his action in court, the public officer may assume the prosecution & recover for the public. If the qui tam action be privately withdrawn;

4 Bac. 405. the public officer on discovery, may institute a new action against the offender. Conviction

2 Com. 383 on a qui tam action is a ~~bar~~ good bar to a public prosecution for the same offence. If the prosecutor in a qui tam action, recover judgment; he may remit his own share of the penalty, but not the public's. Fraud practised by the prosecutor on a qui tam action, does not defeat the public remedy: As, if he delay the prosecution to secure impunity to the offender; still the statute of limitations does not run against the public.

13 Eliz. 480 2 T.R. 712. If on a popular action any number of offenders be convicted, a single penalty only is recoverable. On penal statutes not thus given to a common prosecutor, if an action be

Sal. 182. 4 Burr. 809. brought & judgement be obtained against a number of confederates, each one must pay the whole penalty inflicted by the statute. The reason assigned for the distinction in these two cases is, that actions of the former ~~action~~ class are founded on contracts, those of the latter on torts.

4 Bac. 0.5.4. In crimes are several; in contracts joint. 1 Bl. [illegible] With all deference to these fathers & oracles of the common law this distinction thus applied seems to me frivolous.

The distinction between penalty & forfeiture is that the former is given to one or to any person; the latter to the public. 4 Bac. [illegible]

If a contract, required by Statute to be in writing, an action be brought, the contract must in some cases be declared to be in writing, in others it need not. The rule, by which to determine when it is & when it is not, broken it is not, how necessary thus to declare in this: If at Common law the contract or transaction was valid without writing, it need not be stated to be in writing: But if writing was necessary to the validity of the contract at Common law, it must be declared to be written.

(D3)

It is a general rule, That Statutes cannot have a retrospective operation. From this rule, however, there are many exceptions in the construction of English Statutes: ex. gr. If after the commission of an offence which is matter of fact, the law by which it was punishable be repealed, & a new one substituted, the offender may be punished under the latter. 2 Mod. 310

2 Mod. 310

1 Lev. 270

1 Sid. 138.

2 Keb. 135-12.

Ruel on Cont. 445.

If a man covenant to do a thing, lawful at the time, & a subsequent Statute render the act unlawful; it is holden, that the Statute annuls the covenant. This, however, is a litigated point.

4 Bac. 637

If a Statute, repealing another Statute, is itself repealed; that which first existed is ipso facto revived.

1 Bl. Com. 90.

2 Inst. 684.

4 Bac. 638.

If a Statute invest a body of men with power to transact certain business, & constitutes a certain number of that body a quorum, a majority of the quorum is not, Mr. K. finds, able to act for the whole.

4 Bac. 548. 5. Vol. 9 Inst.

Dominus Rex v. Davis 3 Wils. 203

Dwarris 680.

Quere 680.

3 Wils. 594.

This point is not fitted for this place. See title Corpor. 2nd the act of a majority and not the whole.

The construction of Statutes belongs to the court; to judge of facts, is the province of the Jury. In the case of special verdicts, if it be possible that the facts found may consist with the innocence of the defendant, the

Court cannot infer his guilty [illegible] the facts found are inconsistent with the [illegible] innocence, the court must make the inference. The law is, that the same degree of testimony which is sufficient to authorize a jury to find a defendant guilty, when the construction of the Statute is, by them, understood, is also sufficient to enable the Court in the case of a special verdict, to do the same by comparing the facts found, with the construction of the Statute.

In the construction of Statutes the terms void & voidable are frequently confounded. When a Statute declares void, a contract or transaction which was before only voidable as to persons circumstanced like those, whose the Statute contemplates; the term void is considered as intended for voidable. But if the contract or transaction thus declared void by Statute, be not thus circumstanced, it is construed as absolutely void ab initio.

Some principles of Common Law & the Law Merchant explained.

At Common law [illegible] in the consideration will not vitiate a contract, but [illegible] will. Upon the principles of the Mercantile law, no contract is entered into [illegible] consideration [illegible] the consideration insufficient to annul the contract, the [illegible] is contrary to the maxims of Common law.

Of two [illegible] joint or other joint obligors, one is committed to prison and discharged by consent of the creditor, the other is, on principles of Common law exempted [illegible] payment of a mercantile debt, the rule is otherwise.

At Common law a consideration is necessary to the validity of an engagement in matters of a commercial nature, [illegible] the Law Merchant it is not [illegible] to a purchaser, who [illegible]

10.

6

Mar. 1. Atk. 105. 1 Ch. Ca. 135. 2 H. Bl. 89. 91. 3 Bro. C. C. 585. 7 T. R. 485. 4 Burr. 513. 1 Ves. sen. 28. 8 T. R. 513.

In common law no one can be made an involuntary debtor; though a voluntary contract is a good consideration for an assumpsit founded on a promise. But according to Law merchant, a bill of exchange, accepted for the honor of the drawer, will make them an involuntary debtor.

3 T. R. 330. # Str. 1 Vol. 2 Ves. sen. 120. 172. 4 B. P. 90.

In the Mercantile law, parol testimony is admitted to vary or invalidate policies of insurance, articles of agreement, &c. & many matters unknown to the common law.

Husband & Wife.

1. Of the consequences of marriage, as to the husband's rights to the wife's estate. The general principle on which the law as to this branch of the subject is regulated, is founded on the duty of the husband to maintain & protect the wife. And her estate is therefore only so far his, as is sufficient to enable him to discharge this leading duty.

1 Atk. 354. 2 Ves. sen. 444. 1 Vo. 315. no. 5. 205.

1. Of the wife's personal property in action:- The ownership of this description of property is by marriage, absolutely vested in the husband. And if he dies before the wife, it goes to his executors or administrators.

2. Of the wife's personal property in action:- Of this the husband may during the life of the wife, bring a suit in his own name, while the wife is living, he may dispose of it, release it to possession; she is totally forever debarred of any right over it. But if the husband neglect during the life of the wife to make any disposition of it, it survives to her & she may recover it in her own name after his death.

1 Atk. 354. 2 Ves. sen. 444. 1 Vo. 315. 3 Atk. 520. 1 Vern. 165. 2 Vern. 394. 2 Ves. sen. 444. 1 Vo. 315. 1 Vern. 165.

And even if another suit should be brought after the husband's death, for the same debt, the husband's representatives may plead the former recovery in bar of the action.

It has also been held, that the husband cannot dispose of the wife's personal property by will, so as to prevent her from taking it by survivorship. For as he could not dispose of it himself in his lifetime, it remains entire to her.

If the husband sues on the obligations of the wife, & recovers judgment, both are considered as joint tenants of the judgment; 1 Lord. 179. 3 Bl. 189. Com. 557. And if in this case, either of them dies before collection is made on the judgment, the survivor is entitled to the whole by virtue of the jus accrescendi. [illegible] 3 Rep. 34. [illegible] 2 Vez. 207. [illegible]

3. Of the chattels real of the wife:— Over these the husband has a more extensive right than over the wife's choses in action. All her chattels real are liable during their joint lives for the payment of his debts, & may be taken in ex'on; but [illegible] her choses in action are not. Of the former he is joint tenant with her during their marriage; he has however a right to dispose of them at pleasure: and on the death of either the whole inures by the jus accrescendi to the survivor. Hence neither of them can devise chattels real (the [illegible] of the wife) during the life of the other. And though the husband, while both are living, may dispose of them by sale; yet they are not subject to his debts after his death, but survive entire to the wife. [illegible]

4. Of the wife's real estate:— Of this the husband has the sole usufruct during coverture; but is unable to alienate it; the right of alienation not being considered as necessary to enable him to fulfil the duty of maintaining & protecting his wife. He is considered as holding with her a joint estate for life in this species of property. On the death of the husband the estate [illegible] is vested solely in the wife. On her death it goes to her heirs: though if the husband has had issue a child born alive & capable by law of inheriting the estate, he is entitled to an estate for life by the courtesy of England.— These are principles of common law from which our courts in many particulars deviate. According to the custom of gavelkind; [illegible] [illegible] never had a child; & in [illegible] [illegible]. But gavelkind [illegible] has never [illegible] in [illegible].

In the State of Connecticut, the jus accrescendi in joint tenancy being rejected, it is presumed that the chattels real of the wife would not on her death vest in the husband [illegible] by [illegible] of distribution; [illegible] choses in action, but would be liable for her debts; [illegible] otherwise [illegible].

St. of Car. 2. gives the husb. wife's choses, [illegible] not liable to [illegible] [illegible] 1 Lord. 351. [illegible] 3. 16. [illegible] 46. [illegible] 4 Burr. 635-9.

* The h. may by [illegible] during his life, tho' [illegible] a live; grant her chattels real so as to [illegible] after his death: [illegible] case a right of [illegible] joint passes instanter. 1 Bl. 340. [illegible] during [illegible] death.

[illegible]

If h. [illegible] or [illegible] for his [illegible] 1 Bl. Com. 129. 130. 131.) [illegible] grant will [illegible] his life.

Deviations from the common law doctrine in our courts.

If after judgement recovered by husband
wife sue for her choses in action, before collec-
tion, the wife dies, the husband cannot, the
choses hold the respective as the state of connec-
tent, the right of survivorship being rejected.
In this case the husband has indeed the right of
action, but must account with the wife's re-
presentatives, for what he receives. If after judgement
obtained, before collection the husband
dies, the whole will come to the wife by virtue of
her prior title.

Twenty-five years ago it was determined in
the Superior Court of Connecticut, that the hus-
band should be tenant by courtesy no longer than
during the minority of the issue. But his tenancy
for life, shall not be defeated in favor of collateral
heirs. There has been no adjudication on this point
in the State of Connecticut since the time before mentioned.

By the general rule of Common law, if the hus-
band survive his wife, during coverture, he reduce her cho-
ses in action to possession; he both at law and in equity
have. But if a settlement has been made upon the
wife by the husband; it is considered as a purchase of
all her choses in action, and by his death she may be
compelled by the Chancery to surrender them to his executors; or if
he survive the wife, he may take them into his own
hands, recover them to his own use.

By a statute of Charles II. the husband when
a decree shall pass to the wife, cannot be compelled to re-
cover for her choses in action. And by another
statute he is entitled to administration on
the estate of his wife, in preference
of all others, he may, notwithstanding the rule
of the common law, reduce her choses in action to
possession as well after her death as before, unless
she has disposed of them by devise.

Formerly, no administrator could be compelled by the law of England, to account for his wife's choses in action. But the Statute above mentioned, though it exempted the husband from accounting, compelled all other administrators to distribute the surplus of the intestate's personal property, after payment of debts, to the next of kin. 11 Statute of (the Statutes of) the State of Connecticut makes it the duty of the executors & administrators to distribute the personal property of the deceased according to the rules prescribed by law. And as husbands are not excepted, it is supposed that the wife's executors & administrators are, like all others, obliged to account.

Co. Lit. 351. 3 Ves. 258. 2 Vern. 748. 3 Bro. C. C. 29. 2 Vern. 34 2 Vern. 668. 3 Atk. 393

At common law, the rents & profits of real property belonging to a feme sole, are subject to the general laws regulating her choses in action; but by a statute of 27 Hen. VIII. ch. 10. (Stat. L. 382.) they vest in the husband on the death of the wife. At common law a feme covert can have no estate in her property. But, in case of a gift to a feme covert, to her sole & separate use, the court of Chancery will protect her in the enjoyment of it, and she may exercise a power to appoint over it, as if she were a feme sole. (Property may be thus given to her before or after marriage. (Id. 393.) 1 Atk. 270. 2 Ves. 391. Cas. t. T. 45.

1 Vern. 82. 2 Ch. Ca. 33. 1 Fonb. 94. 5 Burr. 2604. 2 Ves. 665. 1 Fonb. 94. 98. 3 T. Reb. 618. 1 Atk. 270

It was formerly indispensably necessary, in order to settle a separate estate in favor a feme covert, that trustees should be interposed to hold the property. But later decisions the idea has been adopted, though in equity it is considered as immediately vested in the wife, without the intervention of trustees.

Of the Wife's right to the husband's Estate.

II. In England & the State of Connecticut, if the husband die intestate, the wife is entitled to one third of his personal property, if there be issue, to half, if no issue, to half, in either case, (leaving them)

the debts of the intestate must be paid before distribution took.

By the English Common law the wife is entitled to a life-estate in one third of all the inheritable real estate of which her husband was seized during the coverture, unless she has been barred by some act of her own, or else forfeited by an adulterous committed by the husband, provided she survive the husband, and be capable of conceiving. By law it is necessary that the wife join the husband in conveyance of real estate, capable of being inherited by the issue, in order to bar the purchaser against her claim of dower.

In Connecticut the wife is entitled to dower in all the lands of which the husband died seized. The statute, indeed, makes use of the word possessed; but as possession & ownership are in this state often used as synonymous, it is not necessary, in order to entitle the wife to dower in any part of his real property, that he should be, in the legal sense of the word possessed of it: it is sufficient to establish the wife's right to dower that the ownership was in the husband. To bar dower the wife cannot, in this State, be barred either by devise of the husband, or by creditors.

Any disposition of property made by a husband in contemplation of death, & intended as a provision for his family, though it be made by deed is considered as a testamentary disposition. Such a disposition therefore would not bar the wife's right of dower even in this state, because the husband cannot by will deprive her of her dower, though he may by deed, under circumstances different from those first mentioned.

Dower in order to vest in a feme covert, must be given to her to her separate use. But if it clearly appears that property given to the wife was intended to be enjoyed by her, no particular form of words is necessary to vest it in her as such. Though this is the general rule

The heir and assignees of progeniture bind by it to be but tenants for life to the wife.

rule; yet in some instances the wife is allowed to acquire an exclusive right to things given her even though no words are used evincive of the donor's intention that to vest the property solely in her. This exception from the general rule just laid down is founded on the nature of the property, or the circumstances under which it is given. Thus diamonds given by the husband's father to his daughter-in-law on her marriage, are adjudged to be hers. A present made by a stranger to a feme covert is also considered as her exclusive property. And trinkets given by the husband to the wife, i.e. wearing apparel, ornaments, &c. in some cases, the exclusive property of the latter, but these are given to decive it is chimerical. Chattels given by husband to wife in his life-time, & the wife for the express purpose of being worn, & not to be considered as her paraphernalia, for these are chattels which the husband has only the use of.

3 Atk. 393.

2 Vern. 708. 2 Ch. Ca. 75. 2 Ch. Ca. 75.

Thus are the husband's chattels considered.

But these are subjected to certain modifications, to the husband's debts. These qualifications are to be collected from the following cases which bring us to the wife's paraphernalia. (and 2 Bl. Com. 440 n. [illegible])

Of Paraphernalia:

2 Ld. Ca. 411. 1 Com. 220.

What property of the wife, which is denominated paraphernalia, is distributable two kinds: of these the first comprises her necessary wearing apparel & bedding, the second her ornaments as jewels trinkets &c.

7 Atk. 217. 3 Atk. 393. 395. 3 P. Ca. 346. 346. contra. 1 Vern. 477. Co. Litt. 351. Prec. Ch. 730.

During the life of the husband the paraphernalia are his property. (the second kind) entirely at his disposal. But according to modern authorities by which the law on this point is now settled, he cannot dispose of them by will. (vid. 2 Bl. Com. 440) Nor can they be taken in execution for his debts. (Co. Litt. 351. a. Prec. Ch. 730.)

The first kind of paraphernalia can in no instance be taken by creditors for the payment of the husband's debts, nor can he at his death dispose of them by will.

2 Atk. 101. 2 Atk. 393.

Paraphernalia of the second kind are apt to be in the hands of the husband executor, & upon the wife's [illegible] by husband

Bacon. 344. 2 Atk. 104. probably it is charged but not before, & may be sold after it is taken on the writ. personal assets bounded.

By the English law, real estate is not subject to the payment of debts by simple contract, though it is liable for those by specialty.

2 Atk. 77. 2 Vern. 104. 3 Atk. 369. Bacon. 348. 3 P. C. 340. But if a man die leaving personal property sufficient for the payment of able his simple contract debts, & the specialty creditors resort to the personal fund in the hands of the executor & exhaust it, the executor is to be discharged if that it becomes insufficient for the payment of simple contract debts; equity will allow the creditors by simple contract to come upon so much of the real estate as would have been liable to the creditors by specialty, if they had called upon the heir. In this case, the wife's paraphernalia of the second species may also be taken for the payment of debts, but she may immediately be reimbursed, by coming upon the real estate like a simple contract creditor, for so much as the specialty creditors have received of her paraphernalia from the executor. And Chancery will compel the heir to make her compensation. Qu. as to the same right against devisees?

3 P. Wms. 343. 2 Vern. 104. 3 Atk. 369. 2 Atk. 77. 3 Atk. 438. 4 T. R. 95. If a testator creates a trust estate, in lands, & charges his lands with the payment of his debts, still his personal property is first liable. And so in such case the paraphernalia are taken for debts; the wife will, in equity, be considered as a creditor, & may be reimbursed out of the lands of the testator.

In the State of Connecticut real, as well as personal, property is liable for the payment of the debts. And since the [illegible] the executor of the husband be permitted to take the paraphernalia in preference to lands for the payment of debts, would immediately be obliged to reimburse the widow out of the real property of the testator, it would seem improper to permit him to take the paraphernalia in order to pay debts, the real & personal

The right of the wife to claim paraphernalia by the laws of this State is [illegible]

1 Vern. 90.

personal funds were exhausted. For it would be idle & produce unnecessary trouble, to suppose the executor to be driven to the widow & her para-
phernalia. When he allowed her to call immediately on him for reimbursement out of a fund, which was before in his power. With which he might have discharged the debt for the payment of which her paraphernalia were taken. Even her lower ones, the paraphernalia are liable in the last resort.

3 Ves. 395. Of the paraphernalia are the lord of the husband; the wife, not the executor has the right of redemption. And if, in this case, there is a surplus of personal property, after the payment of debts, the wife is entitled to it to redeem the paraphernalia, even before payment of legacies. &c.

* provided it be shewn that the husband has assented to simple contract debts.

Of the husbands liabilities on the wife's account.

The husband is liable, in consequence of marriage, 1.st for the wife's debts; 2.dly for her torts.

3 Com. Dig. Hob. Abr. 3 Bl. 3 Co. 370. 3 Mod. 186 Smith. 30. 1 Ves. jr. 1 Bid. 3. 152. 1 Ves. jr. 172.

1. The husband is liable for the debts of the wife, contracted by her, while sole. But his liability ceases when the wife dies, except the demand attached upon him during coverture. Nothing can be recovered of him for the wife's debt, even if he was found chargeable, unless judgement was recovered against him, during her life. But this latter point is not settled.

7 T. R. 350. A debt contracted by the wife while sole is also to be pushed during coverture. But if the husband dies before it is discharged, the wife, or at the husbands executor, is liable.

The principle, on which the husband is liable for the debts & torts of the wife, is, that

That as the wife by marriage loses the command of her property & has no means of securing her debts, or of securing herself the necessary aid, from arrest & imprisonment, she ought not to be taken without the husband by whose legal rights resulting from the marriage, she is thus deprived of the means of personal protection, against those who might claim upon her. In no case therefore can the wife be taken without the husband or else for debt or tort. Though he may be taken without her: And if both are taken together & the husband escapes the wife must be liberated. 2 Str. 1167. 1 Str. 12. 37. Lunacy. This is taken upon Legard & Williamson — 2 Wils. 244. Where husband & wife are found jointly for her debt, & she dies before judgment, it is doubtful whether recovery can be afterwards had against the husband. Mr. K. thought that on the general principle which regulates the husband's liability on the wife's account, a recovery could not in this case be had against him, the wife being no longer invested with those circumstances under which the leading principle before mentioned, is calculated to relieve him. But judgment is recovered against husband & wife, & the wife dies before payment, the husband is liable on the pledge-ment for, & the next friend or executor is summoned for him.

2. The husband is liable jointly with the wife, for torts committed by her while sole. And the law is the same, if she alone, & without the privity or participation of her husband commit a tort, during coverture. But if she commit a tort in company with her husband, he alone is liable, unless the presumption of coercion can be rebutted by positive proof, that he was either ignorant of what she did or disapproved of it. If the wife commit a tort in the absence of the husband but by his direction, he alone is liable.

Where the husband & wife are jointly liable for debts, she continues liable after the husband's death.

Hale P.C. 2.65.
Co. Lit. 2.33.
Hawk. P.C. 2. 6. 2.
2 Roll. R. 1123.
1 Ld. Raym. 378.
2 Ld. Raym. 1372.

The husband is in no case liable for the wife's private contracts, except in case of high treason or other crime committed by her in his presence, which by knowledge & then indeed the act is considered the husband's, the wife being supposed to act by his coercion.

2.

Of the Wife's power to bind herself & her own contracts.

1 Ld. Raym. 575.
3 Salk. 114.

It is a general rule of Common law that a feme covert can in no instance make herself liable by her own contracts, tho' she may in many cases bind her husband. The grounds on which this maxim is founded, are three: — 1. That the law has given the husband a power over her property & dissolved her to dispose of it.

2 Vern. 190.
2 Ves. jr. 377.
1 Brown Ch. Rep. 15.
2 Bl. Rep. 1144.
Cro. Car. 334.
2 Ld. Raym. 1444.
Yelv. 90.

3. That the husband's right to her person is paramount to all other considerations merely civil. And if he could bind herself & her goods by his right might be infringed. But as Chancery has of late allowed a feme covert to hold separate property, it is now well established & modern adjudications, that she may even while living with her husband bind herself to the extent of that property, but no further. If even in this case, her person cannot be taken in execution, because if she could, the rights of the husband would be infringed. Common law will not however, even under these circumstances, sustain an action against the wife, though there appears to be no reason why they should not.

1 H.B. 336. no. 1.

Cro. Car. 348.

Co. Litt. 133.
Co. Litt. 4. 7. a.
Bulst. 40.
2 Term. 64.

If the husband is banished or an alien enemy, or is transported, the wife is considered as a feme sole, & liable to any other person, liable to arrest & imprisonment. For in these cases, the husband's right to her person, having ceased, cannot be violated.

When the wife leaves her husband under articles of agreement that a separate maintenance, she is liable even at Common law to the extent of her contracts. The ground on which this doctrine may be supported is

1 Vern. 476.
5 Vin. Ab. 334.
Prec. in Ch. 81.
Salk. 116.
5 Vin. Ab. 65.
Dyer. 126.
6 Dunf. 635.
4 Dunf. 565.
2 Bro. Ch. 357.
1 H.B. 337.
Cook. Bankr. Law. 24.

three-fold — 1. That having a separate property, he impliedly assents that she may contract on the faith of it. 2. That the husband's covenant by articles is void as against public policy. 3. That on the case of separation by agreement the marital rights of the husband are at an end & cannot thereby be violated by her liability to any extent. 2. Because the wife living with her husband, enjoys a free estate for life in a moiety of her estate in right during her life.

1 Ves. jr. 25.

3 Atk. 393.

defeat it. And since in England she cannot make a conveyance of a freehold to commence in future, her personal estate is wholly his; she can give no direction as to disposal of her property, except such as is settled to her sole & separate use without the consent of her husband. (2 Ves. Jun. 332.)

"But in the state of Connecticut, a freehold may be granted to the immediate issue of and provision in the own name such issue is unborn: the deed would seem that a feme covert might also convey a freehold to commence in future, without the intervention or consent of the husband. In this case, however, the conveyance must be so framed as not to interfere with the husband's legal rights to her estate. This doctrine has not as yet been established by any adjudications.

"It has been stated in this state that the wife may make a devise. (2 Root 125.)"

Of the wife's power to bind the husband.

The general principle on which the power of the wife to bind the husband is founded, is as between him and the English law, his consent, expressed or implied. This principle, though rational if sound, as far as it extends, is however too narrow to include all the consequences which have been drawn from it. For in many cases where the husband expressly forbids the contract of the wife, yet if his defiant be found, he is still liable. He is bound for necessaries at all events to provide his wife with necessaries, & if he fail or refuse to do it, the man may come here, & make him liable for the amount. Of this principle, then, fear is insufficient.

The true principle which governs under this head appears to be, the husband's obligation arising from the marriage contract to provide the wife with such necessaries & conveniences as are suited to her rank

and case debtors in law. The Wife is the contract of
the husband: Debt on simple contract lies against the husband for
the wife's debts contracted before marriage. The husband
is not liable for the wife's debts contracted after marriage
unless he has expressly or impliedly assented to the contract.
The husband is liable for the wife's debts contracted
during cases:- 1st Where the wife's consent of the hus-
band is given before the contract: 2d Where his con-
sent is expressly given after a breach... 3d Where the
wife usually provides for necessaries for the family
& the husband has made it a practice to pay for
them... 4th Where necessaries provided & the wife come
to his use, or to that of his family... In these
four cases, in aid the liability of the husband may
be founded on his consent expressed or implied. But
there are
two, many other instances, in which the husband is
equally liable, upon the principle of
Id. the voluntary liability, to the parties
founded on the fact of cohabitation, which cannot be rebutted, maintenance
is not liable for the wife's debts, unless he is generally known, or at least
of the husband turning away his wife: he is
not liable for necessaries.

If a wife elope from her husband, or live
with an adulteress, the husband is clearly not bound
by her contracts. If in any case a wife desert-
her husband without just cause, he is not liable
for her contracts, whether with an adulteress or not.
The husband is bound to provide her with
necessaries: Because having forfeited the duties,
she has also relinquished the rights of a wife. This
principle has not been settled by adjudications.

If a husband provide necessaries for his
wife at home, he may prohibit any person or the
public at large, to deal with her, & such prohibition
shall, if the notice be sufficient release him
from her contracts. For in this case she has no
power to discharge the duties, which the law requires of
him as a husband.

But if a husband drive his wife from his
house, or she leave it for sufficient cause, he is bound
by her contracts for necessaries, though made by in-
dividuals whom he personally prohibited to trust her.
Cases de Roc. 6 vid. 1 Bac. Abr. 2 vol. 330. 2 Atkins, 1 - the wife is
guilty of the first wrong; she is obliged to return

22.

The husband is not liable for the payment of money lent to the wife, unless it appears that the money so lent was expended for necessaries; & [illegible] Cro. Car. 387.

If a wife elope with an adulterer, & afterwards offer to return, & the husband refuse to receive her, he shall after such refusal be bound by no contracts for necessaries, for she is stole his wife. [illegible] but if such refusal proceed from any other cause, he is bound.

Articles of separation are agreed upon between husband & wife, & the husband allows the wife a separate maintenance suitable to his & her rank & degree in life; he shall be exempted from all liabilities to her contracts. If her separate allowance is merely voluntary, he shall still be liable.

Of agreements between husband & wife.

The general rule under this head is, That all contracts between husband & wife are void; & that those made between them before coverture, are dissolved by intermarriage.

The reason of this rule, as we are told by the old writers on common law, is, That the legal existence of the wife is merged in that of the husband; & that therefore any contract between them is impossible. To this rule however, there are many exceptions; & many of those cases which are supposed to fall within the rule, appear evidently to be founded upon a principle, very different from that above mentioned.

At common law no contract between husband & wife respecting personal property is valid; because at the law recognizes no right in the wife to hold personal property. And if the husband should give a deed of land directly to the wife; it would at common law, be void. But chancery the rigor of the law in this respect is greatly relaxed. [illegible]

But a conveyance made to a third person, to the use of the wife, is valid even at Common law. And as the Statute of uses executes the fee in the person having the uses; the husband may now virtually make a direct conveyance or to his wife by deed: the deed of conveyance vesting the uses, & the Statute immediately vesting the possession.

Notwithstanding the preceding rules, if the wife has real or personal property to her own use, her contracts with her husband respecting that property, are good in Chancery. & in B. R. & C. P. & the husband is not liable on her contracts for necessaries. & the husband, to encourage a wife in industry engage to make her an allowance, or some part of her earnings, the contract is good in Eq.

A wife may execute a power given her husband or devise her estate. & in this case the English lawyers consider the absolute, as being the choice of the person appointed through the person executing the power. & in a feme covt executes a power to devise in default of issue & no issue born, the power is void.

Though it is a general rule, that marriage discharges all obligations due from the husband to the wife before marriage; yet if the obligation should be left unexecuted by the husband & the wife should survive; it is generally held that the contract made in the marriage, is a continuing one in favor of the wife against the representatives of the husband. The prevailing opinion is that the obligation would be wholly extinguished agreeable to the maxim of the common law that a personal contract once suspended, is forever extinct. & 3 & 3a. B. note.

But if a man gives a bond to his intended wife, conditioned for the payment of a certain sum after his death, it is somewhat doubtful whether it would afford sufficient ground for a recovery in a court of law, though it most probably would. — such a bond is good at law.

2e. Lit. 112–187.

*Com. Law rotain. 4. annual con. vance by a lady made wife dur. the life of Husb.

Com. Dig. 444. 2 Vez. 669.

303. 3 Bro. C. C.

3 P. Wms. 237.

Ibid. 3.16.

1 Bol. Abr. 329. Lach. 129. 2 Ves. 5. 6. 6 Bro. P. C. 155. 2 Vez. 131. Pow. & 148. 158.

3 Co. Inst. 87. Com. Law.

Com. Dig. 441-443. Hutt. 117. 216. Hob. 226. Bro. Jac. 571. Com. Rep. 67. 1 Sal. 325. Carth. 312.

2 Vern. 487.
2 Vent. 343
2 Ch. Ca. 23.
2 Ch. R. 14. 88.
2 Ch. Ca. 343.
2 Ch. Ca. 347.
2 Vern. 94.
2 Lev. 39.
Co. Lit. 187.

On a common recovery, such a bond would be received as after the fact sufficient evidence of the agreement, without inquiring into its validity; as a bond, the court would decree a specific performance accordingly. If a man, by articles before marriage, covenant with a certain person for the sale of certain property, and afterwards, by articles in writing, covenant with another person for the same property, and then marry the first covenantee, the latter articles will be void, and the husband compelled to a specific performance of the first articles.

2 Bro. Ch. 614.
1 Bur. 402.
2 Vern. 396 vide infra

Articles of agreement between husband & wife on separation will be enforced both at law & in equity: And the husband, in such case will be bound to the extent of his contract, whatever it be.

1 Bl. C. 444.
1 Bac. 285.
Hob. 134.
Cro. 113.
3 Keb. 433.
2 Ld. Ray. 1026.
2 Lev. 128.
Sho. 207.

By the old common law the husband might give his wife moderate correction. But this privilege is now antiquated.

As the law now is, if the husband has beaten the wife, she may by complaint bind him to the peace; or if he only menaced her, he may in the same way be bound to his good behaviour. In the former case, he may also be publicly prosecuted for an offence against the public: But the wife cannot prosecute the husband for damages, for if recovered, they would immediately be his.

1 Sh. 478.
Str. 875.
2 Salk. 522.
Bur. 534.

To prevent the wife from discharging his bail, or some such thing, the husband may abridge her of her liberty: But in case of unreasonable confinement she may be relieved by habeas corpus.

2 Vern. 396 vide Ante

By articles of agreement to live separate, the husband loses his power over the wife's person & property, just so far as the articles without them go: So that any future property devised to the wife by descent, legacy, or will, if not expressly the husband's claim, it be not expressly relinquished by the agreement, be so far his as it would have been if no separation had taken place.

2 Burn. 435
Bur. 572.

A husband cannot maintain an action for adultery committed with his wife, after a separation under articles.

If a fine court alone her property by fine or common recovery, the conveyance is good as against her & her heirs; though the husband may disaffirm, & defeat it.

If the husband join in levying the fine or suffering the recovery, the conveyance is valid to all intents & purposes.

There are the only kinds of conveyances from which the wife cannot dissent after coverture.

If a wife grant a lease, or dispose of her property in any other than the judicial conveyances just mentioned, she may after coverture, annul or affirm the contract. And if in this case, she does not either expressly or by implication confirm the conveyance; the heir may, after her death, defeat it.

The reason given by English jurists, why the wife may defeat common, but not judicial, contracts is that in ordinary cases, she is presumed to be too much influenced by the husband to make a contract independent against herself: Whereas in levying a fine, or suffering a recovery, the law, (whether wisely or not) supposes that this objection is obviated by the private examination. The reason assigned by Coke, is still more extraordinary viz. That the agency of the court in a judicial conveyance is the wife's, in this, that the court considers her as not being a feme covert.

The preceding rules of law respecting the conveyances of a feme covert are equally applicable to her purchases. The latter may be disaffirmed & defeated in the same manner as the former.

If husband & wife are married & the coverture; the latter may disagree to the purchase after coverture. But if it be a hereditament in tail, will not be effectual.

If husband & wife join in a lease of the wife's lands: she may after coverture avoid or affirm it.

The wife may, by accepting a jointure before marriage divest herself of her right to dower.

If an obligation is given to a feme sole, she may on her marriage disaffirm & defeat it after his death; & it will then become as an obligation to him alone.

Co. Lit. 3 a. Abr. 336 b. Chan. 291. Dorey. 435.

Prec. Ch. 19. Pool. 336. Dorey 229. 2 Ch. 43.

* A husband & wife cannot alienate the property of the wife, and so of other estates.

Bac. Ab. 382. 3 Co. Rep. 29. Burgis 141. 346. Pool. 345. C. 58.

Pool. Abr. 349. 360. 26.

3 Co. Rep. 26. Pool. Abr. 349.

Pool. 349.

The qualities essential to a jointure are these:
1. That the estate of which it consists be for at least
for the wife's life. 2. That it be an estate in lands &
3. That it be not merely a colorable, but a com-
petent allowance. And if this be the case
must pass. Gen. Unif. A jointure have these three
properties, it will not bar the wife's right to dower.

The husband may settle a jointure on
the wife after marriage. In this case however the
wife may, if she pleases, waive the jointure & take
her dower. But in no case can she take both.

If the wife agrees to accept a gift by devise,
instead of dower, she may after coverture, accept or
refuse it at her election. And when property is thus
given to the wife by devise instead of dower, she may
take both; unless it be expressly mentioned, that the
gift by devise is instead of dower, or unless the hus-
band has bequeathed all the rest of his property. For
such a total disposition is proof of the husband's in-
tention, that the estate devised to the wife, should
be a substitute for dower.

It is doubtful whether under the statute of
Connecticut ~~jointures~~ are not considered hereditaments
by descent. [illegible]
[illegible] husband and wife.

2. Of the mutual incapacity of husband and wife to testify for or against each other.

The general rule under this head is, that hus-
band & wife can in no instance testify for or against
each other. One reason for this rule is, that the hus-
band & wife are the same person, [illegible]
[illegible] and the reasoning holds [illegible]

In some other instances however may be a witness
against husband with the consent of the latter for
[illegible]

Gilb. Ev. 254. Cowp. 5... 1 Rav. 2 ... 594.

himself: But the wife of one party to a suit cannot testify in it even with the consent both of her husband & of the opposite party. This principle of law is intended to prevent domestic disturbances.

To the preceding rule there are some exceptions:— As

* The wife can not in any case give evidence even in [illegible] to criminate her husband & vice versa. This ... is even to cases between third persons. 2 T. R. 263. 2 [illegible] 752. Esp. 720.

1. Where the wife exhibits a complaint against the husband for breach of the peace or to bind him to his good behavior, she may be a witness against him; & vice versa. 2 Hawk. 432. Esp. 721.

Hutton. 115. If L. is indicted for [illegible] he may be a witness agt. him (1 Ray. 1) qu. 2 Haw. 605. [illegible] 633.

2. When the husband is prosecuted by the public officer for a breach of peace in abusing his wife she may (2 Hawk. 305) it has been holden, testify against him. But the case in Hutton in which this point is maintained has, in two or three cases been [since] denied to be law. Though by the latest authority on this point, the law in the case in Hutton is declared to be good.

In the Superior Court of Connecticut this point has never been settled. But the principle as laid down in Hutton has been established by one of the County Courts.

+ Vid. ... 2. [illegible] 4 Bac. 44. [illegible] 3 ... [illegible] 2. [illegible] 3. + Vid. infra.) que. if she marries after declar. filed? 6 Durnf. 265. 4 Bac. 39. ... Car. 232.

If damages are recovered by husband & wife for any injuries offered to the latter; the judgement is in the nature of a chose in action, holden by them in joint tenancy: so that, upon the death of either, it will survive to the other. But as in this State there is no survivorship recognized, the whole, it is thought, would survive to the [illegible] relations of the wife.

In cases of personal injury done to the wife, the husband is entitled to an action on the case per quod consortium amisit, distinct from that, in which he joins with the wife, for redress of the personal injury.

+ Vid. [illegible]

There are some cases in which the wife must be joined with the husband in an action; others in which he may sue alone or join the wife at his option; & others in which the wife cannot be joined.

Com. D. 572. 3 D. Rep. 627. 1 ... 3.33. Bac. 304.

Where the action would survive to the wife, she must be joined. (1 Mod. 224 — ... 3.25 — ... — Cro. ... 501.)

One reason why the wife may not sue alone in actions of this description, is partly to save the opposite party harmless, who, if he should recover a libel costs against the wife only, could not collect them; the other reason is founded on the maxim of law that the wife cannot be taken on civil process without the husband. ... This rule holds ... administ. 3 D. Rep. 616.

Husband & wife must join in an action to evict the defendant from the wife's land; in suits on her choses in action; & to recover rent due to the wife while sole. And though the right of action which would survive to the wife, accrue during coverture, she must be joined, as in case of slander, assault & battery, trespass for cutting her trees &c. But in an action of trespass for destroying emblements on the wife's land she must not be joined, because these would not survive to her but go to the husband's executor ... if she ... in lieu ... after the husband's death, ... wife ... if ... an action is brought against a feme sole and, pending the suit she marries, judgment may go against her in her maiden name, & she may be taken in execution without her husband being informed. If a bond is given to wife only, during cov., can h. sue alone upon it? ... or the finding a suit by feme sole & marriage, the action dies. ... As to the mode of suing in trover for wife's goods when the finding is before the conversion after, marriage ... He may sue alone, or join the wife at his election, where though the wife is the estate is the meritorious cause of action. The wife does not survive to her: As in an action to recover compensation for the wife's labor or for ... during coverture: But ...

3. When the wife is named in suffering cause of an action brought for consequential damages & the interest of the husband only is immediately concerned; as in an action per quod consortium amisit for damages ...

Margin notes (left):
D. D.
Salk. 219.
Cro. Eliz. 133.
... 250.
... 316.
1 Bac. 305.
... 413–2 ... 217.
Vol. Abr. 347.
Cro. Eliz. 537.
Cro. Eliz. ...
... 33.
*Dent. 195. This case not reconcilable ...
Cro. Jac. 501.
Cro. Car. 30.
1 Com. D. 574.
Rep. 1525.
Esp. 328.
Cro. Jac. 323.
*4 T.R. p. 19. 218.
1 Com. 573 — 4.3 ... 403.
*qu. if no promise is made ther. in case of ... Bac. 305.
4. Mod. 156.
... 114.
... 316.
Cro. Jac. 6–45. 31. 442.
Esp. 296.
Sh. 229
Thol. Abr. 318.
Cro. Jac. 442.
Mod. 273

Went. 161. Cro. Jac. 77. 205. 501. 1 Str. 229. — [illegible] or a personal injury to the wife, [illegible] 346. Cro. Car. 89. [illegible] 140. [illegible] 791. 2 [illegible] 30[illegible]. the husband must sue alone. [illegible] 200. 2 [illegible]. Bac. 306.

12. Com. 5[illegible].

In what cases the husband should be sued with, & without, the wife.

Mits. 149. Co. Lit. 351. Rol. Abr. 6. Palm. 313. [illegible] 328. — 1. The general rule under this head is, That when the action would survive against the wife, she should be joined with the husband in the action: [illegible] in actions 3 Co. C. 366. [illegible] 345. [illegible] for debts due from the wife while sole; for torts committed by her before coverture, & for those committed ~~after~~ during coverture without the direction or connivance of the husband. [illegible]

1 Rol. Abr. 351. [illegible] 25. This between [illegible] 11 [illegible] 27. — [illegible] If an action be brought against the wife alone, when the husband ought to be joined, advantage must be taken of the mistake by plea in abatement or not at all. [illegible] alone [illegible] 3 Bac. 22. 2 Bac. 25. [illegible]

2. But where the action would not survive against the wife, the husband should be sued alone. — [illegible] is bad: [illegible] Palm. 313.

If a feme sole [illegible] an action of debt lies agst. husband & wife for rent due before coverture; but against the husband alone for that which accrues after marriage.

If an action be brought against husband & wife [illegible] in a battery committed by them both, the suit may be abated, because in such a case the husband alone is liable. [illegible] Palm. 433. And if the husband neglect to plead this in abatement, & a verdict be found [illegible] the wife ~~only~~, the verdict may be set aside, for judgment cannot go in this case against the wife [illegible] 203. [illegible] Sig. [illegible]

Co. [illegible] 203. Yelv. 106. Went. 93. Str. 394. [illegible] — If husband & wife have both been beaten an action cannot be brought by them jointly to recover the whole damages. But if the husband & wife in this case bring a joint action for the whole, & the defendant neglect to plead the mistake in abatement, the husband may after verdict take out execution for the damages given for the injury for the wife's injury [illegible] for the injury done to himself. [illegible] Com. 5[illegible].

Went. 328. 2 [illegible] 20. — If husband & wife are [illegible]

2 H. Bla. 17. Burns. [illegible] 96. [illegible] — in a case where the husband must [illegible] 2 [illegible] 327. the wife may be [illegible] [illegible] [illegible]

[illegible] [illegible] [illegible] 15.

Hist of Eng. Law. Hal. 191. 111. 307. 4 Mod. 73. 2 Vern. 68. Lynden. 173. Cham. L. C. 2. 343. 2 Ch. Cas. 219. 376. 2 Ves. 75. 193. 3 Ves. 303. 378. 3 Atk. 709. 2 Ves. jr. 264. 205. 1 P. Wms. 126. 2 P. Wms. 92. 310. 1 Vern. 245. 2 Vern. 253. 2 Ves. 2. 264. 10. 2 Ch. R. 115. 3 Ves. 328.

Of the wife's power to devise in the State of Connecticut.

At common law a feme covert might devise real estate pendente viro, which was in its nature devisable. She could not devise her personal or real property at common law because it was not in its nature devisable. And the Statute which has altered the common law in this particular, does not extend to feme covert.

Estates in the State of Connecticut, real, may be devised and as the statute which governs does not exclude feme covert, our freehold estate may now be made to commence in futuro, & of freehold to arise. That wives may now devise and probate, so as not to violate the Husbands curtesy. Mich. ideas on this point thought rejected by the Supreme Court have been adopted by the Supreme Court of Errors; & one application for a new trial, have been abhorred by the Legislature. See authorities in the margin. — Wife's power revoked by marriage. Bro. Ab. 4 Geo. 2 Ves. 172. 3. 4 Burr. 2453. Ld. Ld. Raymond 1. 1. 5. 3 Ves. 328. Ld. Ld. Raymond 1. 1. 5. 3 Ves. 328. Ld. Ld. Raymond 1. 1. 5. 3 Ves. 328.

Of the celebration of Marriages.

The Common law of England contemplates marriage merely as a civil contract. In the States of New England it has also been considered as a religious civil institution.

Salk. 119. 437. 438.

By the old Statute of Connecticut no person is allowed to celebrate a marriage, unless published or a license of parents & the town clerk, the usual and is published for or Justices of the peace & Clergymen have now the right of marrying within their respective counties.

Power of performing the marriage ceremony. 1 Ves. 20.

It is generally agreed that if a Clergyman was justified in the knowledge to celebrate a marriage contrary to the provisions of this act, the marriage would be void though the person celebrating it would be liable to a penalty.

But it has been supposed, that if any person, other than a justice or a clergyman, should celebrate a marriage, it would be void. The opinion is doubted by Lord Hale. The distinction is, that in either case the marriage would be valid. But see Lord Ken. [illegible]

[illegible] void.

Marriages.

The law which in England prohibits marriage on the score of consanguinity, extends where [illegible] the statute authorizes all marriages not [illegible] by God's law as now within the Levitical degrees.

The canonical impediments to marriage in England are consanguinity, affinity & one existing. The impediment of pre-contract is now abolished.

All persons lineally related are forbidden to marry.

In the State of Connecticut the impediment of pre-contract is not recognized.

The general rule for ascertaining the degrees of consanguinity & affinity, within which marriages is unlawful, is, That no person can marry his next collateral kinswoman, or the next of kin to his next lineal or collateral relation. And vice versa. This rule is founded on the construction given by the Levitical law. In computing these degrees the rule of the civil law is adopted. So that the issue of marriages contracted within these prohibited degrees are legitimate, unless a divorce takes place during the lives of both the parties.

If a man or woman marries, while his wife or her husband is living; the latter marriage is void ab initio.

Divorces are of two kinds: a vinculo matrimonii & mensâ et thoro. In the former case, the issue is illegitimate; in the latter, not so. [illegible]

32.
Co. Lit. 235.
2 Ro. Car. 462.

Causes of divorce a mensâ &c. are three:— 1. Adultery — 2. Extreme cruelty — 3. Wilful desertion.

If after divorce a mensâ &c. a child is born, it is presumed to be illegitimate; but this presumption may be rebutted. But, in case of a mere voluntary separation, issue born afterwards is presumed to be legitimate.

Parliament has of late divorced à vinculo for adultery; but the Spiritual court cannot.

Law in Connecticut.

In this state marriages contracted within the degrees prohibited by Statute, which are intended to be the same as the Levitical, are not merely voidable, as in England, but absolutely void. Of course the issue must be illegitimate.

A man may now, however, by a Statute of Connecticut, marry his wife's sister; a thing unknown

The Sup. Court in this state can grant no other divorce than that à vinculo; & for no other causes than 1. Fraudulent contract, which probably comprises all the cases at present in question — 2. Adultery — 3. Three years' wilful absence, with a total neglect of marital duties — 4. Seven years absence, if the party be not heard of.

In case of seven years absence on one part, the other party may marry without divorce. The surviving absentee may, on returning, annul the latter marriage; but the parties contracting it, are not punishable. If, in this case, a divorce is obtained, the latter marriage is good after all [illegible]

In the case of divorce a vinculo for adultery, the wife is not the guilty party; she may have power of her husband's estate. In this case the Sup. Court may grant her a part of the husband's estate not exceeding one third. And if there is no real estate, the Court may make a grant of the husband's personal property, not exceeding the one third of that. Such a grant by the Sup. Court has been sanctioned by the Court of [illegible]

The Legislature in this State may divorce a vinculo, or a mensa et thoro at their election, & for the following causes: 1. Propter sævitiam. & 2. Propter metum.

1 Rol. 240. 15. 1 Sid. 112. — The marriage of an idiot has lately been holden to be void; formerly it seems to be [illegible] otherwise.

1 Rol. 341-2. Co. Lit. 89. 33, [illegible]. — The age of consent in Eng. is 14 in males & 12 in females. The same is supposed to be the law here. If either parties under age of consent, either may disagree: but not after the former is at age of consent. (be contra 3. Bac. 110).

Of Parent & Child

including Guardian & Ward.

A bastard is called in the Eng. law nullius filius: And to this maxim That a bastard is related to nobody the Eng. law strictly adheres, except that no person can marry an illegitimate relation within the Levitical degrees. (1 Bac. 55.) (1 Bac. 459.)

[illegible margin note: 1 S. [illegible] … bastard … 1 Bac. [illegible]]

By the word Child is usually meant in law a minor, or one in a state of pupilage. Full age is computed [illegible] day preceding [illegible] anniversary of the birth. [illegible] 4. 625.

1 Bl. Com. 464. Co. Lit. 247. Haw. P.C. 2.1. Fort. 70. — No child under seven years of age, can be punished for any crime. At fourteen he is equally liable as any other person for torts & crimes. From 7 to 14, he is, or is not, liable as the case may be. But the presumption is said to be during this period in the child's favor.

[margin: [illegible] Fourth. 81. 9 Vin. 394. Rol. 729.]

In general no person can legally contract till 21. Age for choosing guardian: 14 in males & females.

A minor may be executor at 17 but no person can be an administrator till 21. 3. Bac. 121. [illegible]

5 Co. 29. Hob. 250. — In an action of slander a minor is not liable till 17, tho he is to other torts at 14. 3. Bac. 132.

Noy's Max. 129. [illegible] 43. 23.

Full age is 21 years in both males & females.

A male infant of 14 may, if proved of sufficient discretion, make a testament of personal estate; a female at 12.*

[margin: * [illegible] for making [illegible] males & females [illegible] 22.)]

Infants under 21 are considered as wards to their parents, [illegible] 3. Bac. 131. Co. Lit. 240. Cro. Jac. 465. Plow. 364. 1 Sid. 25. [illegible]

[illegible]

34.

Of the Contracts of Infants.*

If an adult contract with an infant, the former is bound but not the latter, according to the current of authorities. + Nov. 25

For necessaries infants may bind themselves; these are food, abbard, physic & instruction. But it is requisite, in order to bind the infant that there actely be necessaries for him at the time of contracting for them. The ascertainability of a contract of an Infᵗ for necessaries, is only commensurable to the ascertainability of an Infᵗ

But if an infant is under the actual government of a parent or guardian, & that government is duly exerted he cannot bind himself even for necessaries. An infant can bind himself only in the case following:- 1st he has no parent or guardian - 2. if he is absent from them out of their reach - 3. if, having parent or guardian, & being under him, he is not duly governed provided for. On the ground on which the infant may bind himself in any case, is, that he may not suffer, or need those things which are necessary for him.

The Statute of C. is supposed by many to vary from the common law, as it respects the infant's power to bind himself: & imagining that it does not.

Of the mode of contracting by Infants.

If an infant give a bond even for necessaries, he may avoid it; but on his mobile, he ought to be still bound on the simple contract. If he give a single bill for necessaries, he is bound by it. But a negotiable note, actually negotiated, he is not bound; if it remain in the hands of the original payee he is - on an original contract but if he is not bound on a bill of exchange not bound. - In Virginia.

The governing principle, on which to determine when an infant is, & is not bound for necessaries, is to be this:- When the instrument entered into by the infant, is of such a nature, that the consideration may be examined the contract is good. When the consideration cannot from the nature of the instrument be examined

the contract is not binding. The rule is evidently calculated to secure infants from imposition.

The rules adopted by the court on this point, may all be made to accord with the preceding principle. For though the consideration of a single bill cannot now be examined, if connected with the principle on which [illegible] the items of an account may be struck out. 1 Peake 169. 3 Bac. Ab. 136. 2. [illegible] may now be gone into. How formerly, upon a note of a negotiated note, the consideration cannot be examined, because it would injure trade: if a note not negotiable, or not negotiated the consideration may be searched into.

In Pretty's indeed, an infant can hardly be said to be ever bound by his contract. For he is bound not by his own express agreement, but by contract implied in law — not (as the case may be) to the extent of the contract, but to the real value of the necessaries purchased.

In this state, notes of hand are considered as specialties; yet on courts have examined the consideration of notes given by a minor.

Bill of exchange does not bind an infant, because the consideration cannot be examined. [illegible]

Money lent to an infant will not subject him to [illegible]

An infant purchases articles to maintain his station in life, and which are in the usage of his profession, he is bound by the contract. [illegible] the amount of the account struck out.

An infant do without compulsion, any act which Chancery would compel him to do, he is bound by the transaction: as if an infant heir sell off dower to the widow. And though on arriving at full age, marriage the transaction is examined; yet if no fraud be discovered, he is bound by it.

Exempt Cases.

Contracts of Infants void or voidable.

The contracts of an infant in relation to personal property are generally voidable, not being for necessaries: [illegible]

A promise by one of full age will bind him to a contract made during infancy, when the contract is only voidable; but where the special contract is void, it ought on principle to bind him, on the ground of the former contract or moral obligation.

The general principle by which to determine when a contract is void, & when voidable, seems to be this:— If the infant is sufficiently guarded from injury by the contract being only voidable, it should be considered as merely voidable. Otherwise if should be void.

Another rule, which has been adopted is, That where the contract of the infant is merely executory, or where the thing contracted for has been delivered to him; he can only avoid it, i.e. it is voidable: But where it is executed, & the thing not delivered; (vid. 37.) it is void.

When an adult contracts with an infant, the former is bound, tho' the latter is not. And if in this case, the infant has received the consider.n & afterwards avoids the contract, it is holden that he is not bound to refund what he has received. This opinion is hardly tenable on principle. It is presumed that the infant might be obliged to refund by an action of some, or on a promise implied by law of delicto of the infant.

Semble this parent may both be liable for necessaries furnished to the servant: But if the parent make an express contract for them, the infant shall never become liable.

Infants are liable criminaliter for felonies; but according to the current of authorities, not civiliter. In the other case when one is liable criminaliter for a tort he is also civiliter. And on principle the infant ought to be liable civiliter, notwithstanding the ground of contract out of which

1 Vern. 132. 2 Vid. 224. 1 Vid. 401.

And indeed in the case last mentioned a court of Chancery will interfere & oblige the infant to deliver.
1 Comyn. 201. 2 Eq. Ca. Ab. 489. 9 Mod. 38. 3 Vin. 415. 1 Bouck. 393.

3 Burr. 1798. 3 Bac. Ab. 139.

If an infant sell goods & do not deliver them, the contract has been considered as void & he may have an action of trespass ag. the vendee for taking them. But if the infant deliver them, the contract is only voidable, & an action of trespass will not lie. (vid. 30. [illegible] replevin & de-mand & refusal trover & [illegible] will lie.)

Though infants are bound by a decree in Chancery, 1 Fonbl. 75. 3 Atk. 626. 2 P. W. 401. 1 [illegible] 504. [illegible]

4 Vid. 35. 2 Vern. 342. 232. 1 Vern. 351. 9 Vin. 415.

yet that Court allows them six months after they arrive at full age, to shew cause ag. the decree. And if sufficient cause be shown, the Court will set the decree aside.

4 Vid. 3. 35. 22. 86. 1 P. [illegible] 5 Mod. 368. Cal. 387.

For money borrowed, & actually laid out in necessaries, the infant is liable in Chancery; [illegible] but at law he is not, unless the lender himself, purchased the necessaries.

Contracts capable of being affirmed by the infant when he arrives at full age, are in their nature not void but voidable. Doug. 53. Cowp. 201. 1 [illegible] 132. [illegible] 728. 2 [illegible] 706. (vid. 137. 53.) [illegible] 405.

3. 2 Vent. 203. Cro. Jac. 320. 1 Rol. Abr. 731.

Any act of the infant after he arrives at full age showing an intention to waive the privilege of infancy, [illegible] Co. Lit. 172. 3 [illegible] 65. [illegible] 275. 42. affirms the contract. [illegible] 3.

Moor. 76. Co. Lit. 380. [illegible] 220. [illegible]

An infant having made a conveyance by fine or common recovery, 3 Bac. 124. 134-5. [illegible] writ of error may waive it during his minority, but not afterwards.

2 Rol. 572. 4 Rep. 125. vid. 35. [illegible]

Feoffment by an infant is only voidable; & he may avoid it either before or after he arrives at full age, [illegible] during [illegible] Co. Lit. 380. [illegible]

xx [illegible] it during minority. 2 [illegible] 161.

Bargain & sale [illegible] be avoided [illegible]
[illegible] in equity.

Celebrated Cases

[illegible] 1 Bz. Ch. 152. [illegible] 135.

A marriage-settlement by a minor is valid.++ [illegible] a female [illegible] may [illegible] a male infant [illegible] 5 Bac. [illegible]

[illegible] 282. [illegible] if a male, [illegible] 2 if a female. 2 [illegible] 333. 463. 2 [illegible] 497. [illegible] 376. 1 H. Bl. 75.

If a minor at 17 devises money or other property to pay his debts, the devise shall be considered as a ratification of his contracts, & his executor shall be compelled to fulfil them.

If a minor makes a power of attorney to confess a judgement & execution issues, the Eng. Courts will call the parties together, & on proof of minority will grant relief ag. the execution. But as this practice does not obtain in our

per cent. The judges that the infant must in order to obtain relief here, consider all the proceedings as a nullity, & bring his suit against the opposite party.

1 Atk. 489. A widow made a lease of lands belonging to her infant children: one of them at 19 confirmed it ten years after he all attained their age. She attempted to set aside the contract, but the Court affirmed it.

An infant is incapable above 17 of performing many religious duties: for tho' capable, in other respects, yet in case of gross misdemeanors on his part or imprisonment on the other, Chancery will grant relief.

Whether existing at Common Law created by Statute like Felony, & Treason Felony, & Treason are subjected to the same punishment & like liabilities are liable. But infants are not subject to corporal punishment by Statute, to any particular crime, unless specially named: yet the Common law punishment for the same crime, may be inflicted upon them as he [illegible] upon others.

Cunt. 147. ++Hard. 33. but Co. Lit. 246. Co. Inc. 405.

3 Inc. 133-4. Mar. Rep. 20.

Contracts of infants are voidable, except in some things which is found to be for their benefit, & such as a Court of Equity will enforce.

4 Co. 43.

1 Ves. 299. Cited 61.

An infant cannot execute a power to convey real estate. 1 Inst. 2. Co. Lit. 2 Rol. Rep. 229. Sta. 664. Power to give for life to A. B. & his heirs male, remainder to C. in fee, A. cannot be a good tenant for life.

2 Vern. 713. Moor. 177. 3 637. 2 Ro. J. 423. 1 Ed. 163. 2 How. 163. Carth. 309. 1 Co. 50.

An infant in ventre sa mere is to many purposes considered as in esse. By the Common law, a devise to an infant in ventre sa mere could not take effect unless it was [illegible] as a remainder, & then only [illegible] 3 Bac. Ab. 124. 4 Co. 60. 5 Co. 68. are exceptions to these. The Statute 43 Eliz. c. 4 infants in ventre sa mere are considered in esse. [illegible] 1 Ld. Raym. 739. 3 Atk. 395. 2 Atk. 228.

Some offices a minor may hold, others he cannot. So his grant &c. Co. Lit. 172 — Dalt. 169 — Palm. 320 — Hob. 320 — Co. Rub. 42 — 1 Lev. 4 — [illegible] 2 Vern. 342. H. 295. Hob. 347.

It is a general rule, that infants shall not pay their own debts. And if one enter on an infant's land & commit waste, he may be made to answer as trustee for the infant to a bill in Chancery.

The right of entry upon lands is not taken away from infants & from adults.

In the State of C. the right of entry on lands is never lost by the owner, as long as the property continues in him.

An infant sues in the above cases for waste

An infant holding an estate to which a certain duty is annexed, is punishable for non-performance; & may maintain an action for the rent, but is not liable for the penalty, or for discharge the rent, but is not liable for the penalty, or for

According to the current of authority infants are barred by a Statute of limitations if not excepted. But Quere.

An infant is bound by condition to a grant, legacy &c. unless the condition be in notion of a penalty: For then he is not bound &c. 2 Vern. 503 - Co. Litt. 240. - (It is not to be inferred from the words "void" or "voidable" - The word penalty has created a distinction between conditions & conditions.) 5 Co. 119. 3 Bac. 129.

An infant legatee may receive interest after a year &c. without demand.

An infant must bring his suits in his own name but by guardian or prochein amie. He can sue by prochein amie in three cases only: - If he wishes to sue his guardian - 2 if he has no guardian. And in these cases the guardian or prochein amy is liable for costs. 3 Bac. Abr. 144. King. 1 Com. 503. 7 Bac. Abr. 577. 2 Vern. 127. 2 Bac. Abr. 2 pl. 2. Barn. 120. 1 Com. 503. 7 Bac. Abr. 577. 2 Vern. 127. Barn. 105. 1 Bl. Com. 463. Cro. Jac. 640 Yelv. 92 Peake. 296. Infra. 2 Vol. 1 Salk. 44. Str. 1217. 3 Bulst. 183. Hutt. 96. 2 Bac. Abr. 2 pl. 2. Barn. 120. 1 Com. 503. 7 Bac. Abr. 577. 2 Vern. 127. 3 Bac. Abr. 144. King. 1 Com. 503. 7 Bac. Abr. 577. 2 Vern. 127. Barn. 105. 1 Bl. Com. 463. Cro. Jac. 640 Yelv. 92 Peake. 296. Infra. 2 Vol. 1 Salk. 44. Str. 1217. 3 Bulst. 183. Hutt. 96.

When an infant is sued, he must always defend by guardian: And if he has none, the Court will appoint one. Cro. C. 640. Hutt. 96. 3 Bac. 150. Co. Litt. 135 b. 2 Bac. Abr. 355. 2 Com. Dig. 332.

All judgm. ag. infants without guardians are erroneous in fact; that is, the error does not appear on record. And in such a case is not a writ of error coram vobis. (2 Vol. 2 pl. 3.) - But a case may be made out by affidavit, & the Court may give time to summon the guardian &c. &c.

If an infant is sued with others who are adults, the guardian is not summoned, the writ proceeds against the adults, & damages are assessed against them only, & judgm. thus obtained has been reversed erroneous. 2 Bac. Abr. 2 pl. 2. Barn. 120. 1 Com. 503. 7 Bac. Abr. 577. 2 Vern. 127. 3 Bac. Abr. 144. King. 1 Com. 503. 7 Bac. Abr. 577. 2 Vern. 127. Barn. 105. 1 Bl. Com. 463. Cro. Jac. 640 Yelv. 92 Peake. 296. Infra. 2 Vol. 1 Salk. 44. Str. 1217. 3 Bulst. 183. Hutt. 96. Cro. Jac. 640 Yelv. 92 Peake. 296. Infra. 2 Vol. 1 Salk. 44. Str. 1217. 3 Bulst. 183. Hutt. 96. 2 Bac. Abr. 2 pl. 2. Barn. 120. 1 Com. 503. 7 Bac. Abr. 577. 2 Vern. 127. 3 Bac. Abr. 144. King. 1 Com. 503. 7 Bac. Abr. 577. 2 Vern. 127. Barn. 105. 1 Bl. Com. 463. Cro. Jac. 640 Yelv. 92 Peake. 296. Infra. 2 Vol. 1 Salk. 44. Str. 1217. 3 Bulst. 183. Hutt. 96.

If some of several defts. in a suit on contract, pay the whole int. he has his remedy ag. the rest: But if the suit be brought on tort, he has no such remedy.

Of Negligence.

Remote, no impossibility of access. Lucas v. Tarleton. 3 Bl. R. 1392. 1 Bl. R. 480. 3 Bac. Abr. 420 Cro. C. 244. 2 Vol. 2 pl. 3. 10 Co. 57. 7 Bac. Abr. 302. 4 Dessau. 355. 2 Vol. 2 pl. 3. 10 Co. 57. 7 Bac. Abr. 302. 4 Dessau. 355. Esp. 483. Hes. Sund. 420 Cro. C. 244. 2 Vol. 2 pl. 3. 10 Co. 57. 7 Bac. Abr. 302. 4 Dessau. 355. Esp. 483. Hes. Sund. 420 Cro. C. 244. 2 Vol. 2 pl. 3. 10 Co. 57. 7 Bac. Abr. 302. 4 Dessau. 355.

43.

Authorities for bastards: 2 Bl. 10. 480. 2 Inst. 2. 484. [illegible] 225. 1070. Co. Litt. 3 a. 244. 10. 335. 60. 2 [illegible] 4.

In England, if a man after an absence of several years marries a woman who brings forth a child within three months, or even a shorter period, the child is legitimate; i.e. according to the old rule. See Co. L. 244. a. 1 Bac. 310. [illegible] See my notes No. 12.

No rule similar to that of the extra quatuor maria has been adopted in this country.

(A bastard though incapable of inheriting in Eng. may inherit as heir by remainder or reputation. [illegible] 2 Bac. [illegible] 512. (See my notes No. 12.) [illegible] But a grant to [illegible] [illegible] definition of "children" &c. (Moor, [illegible]) [illegible] is good. Co. Litt. 3. 2 [illegible] 43. ([illegible] 43, not [illegible]) Ibid. 332.

If a bastard eigne enter upon his father's estate & die seised so that his issue take it, the mulier, tho' not deprived of it, is [illegible] respecting his father['s] legitimacy. 1 Bac. 315. [illegible] 44. [illegible] 330.

[illegible] [illegible] marriage [illegible] parents.

The maxim of the Eng. law that a bastard is nullius filius is not adopted in this State. 1 Sw. 331. Con. [illegible] 33

[illegible]

To permit a bastard to inherit might tend to destroy domestic tranquillity. So far as this reason reaches the Eng. law [illegible] perhaps would be adopted here, but no farther. 1 [illegible] 331. 1 [illegible] 457.

The court of Errors has once decided that a bastard could not be heir to his mother: But the court have since [illegible] decided [illegible] that the mother cannot [illegible] inherit [illegible].

A bastard in this State is settled where his mother last had a settlement, [illegible] in Eng. [illegible] 427. [illegible] 1 Bac. [illegible] 364. 458, 365.

20.

In C. the father & mother of an illegitimate child are equally chargeable for its maintenance. The damages given in an action by the mother ag.t the father, are for the support of the child till four years old. [illegible] 258 [illegible] An application to a justice of peace by the mother during pregnancy, ~~[illegible]~~ & under oath, the person charged as father may be bound over to C. Court. He is [illegible] [illegible] recognizance [illegible]

The mother's oath is prima facie proof, but not conclusive ag.t the person charged. A possibility or probability that another is the real father, will not avail the one charged by the mother.

The form of the action instituted by the mother is altogether ~~[illegible]~~ criminal, the ~~[illegible]~~ [illegible] merely civil.

3. Ld. R.
3 T. R. 7.

In addition to the action of the mother the father
parent may have an action of his own ag.t the father.

1 Ld. R. 44.
2 Ld. R. 63.

The father is also liable for expences accrued antecedent
to the suit. The ex.n ag.t the father issues generally for
four years; & if the child dies before that term expires,
the subsequent executions may be stopped. But if the
expences of the child greatly exceed the sum adjudged to
the mother; the father may be obliged to pay more than
was allowed her by the Court or jury: And this increased ex-
pence will on application to the Court be ordered to be
remaining
granted by executions.

Salk. 120. pl. 5.

It has been a hovering opinion, that in order to
charge the father with maintenance of the child the mo-
ther must swear positively upon him during her travail; but
that formality has been of late dispensed with. The judg-
ment given ag.t the father & the child obliges him to find
sufficient
sureties for the payment of the damages found; & also, if re-
quired by the
quired, to secure the town from any future expence in rais-
ing & educating the child.

Must be sworn
by the mother
herself, or by
some other
person in her
presence?

If the mother does not prosecute or discontinue
the
when she gives birth to a child, may in either case prose-
cute for
cute for the same, & recover. In these cases it has been held,
that the oath of one may oblige the mother to charge the
child on oath on the father: Mich. 8 Geo. 1st. B. R. Rooks & Thurwick. — 10 Geo. 1st
B. R. a exception to it, for it is not necessary the mother should be sworn: said
by the father, after judgment given ag.t him does
not find sufficient for payment to the mother (if in dem nis-
ing the lower pr required) he is committed as a criminal
for not giving bonds; for this case he cannot be admitted
to the poor man's oath.

Criminal causes are in general not abatable.
In C. therefore an action of battery &c, being criminal in its
nature originally not abatable: although however now attended
with civil consequences; but according to the strictest accepta-
tion of the word in this action is allowed. Only in this case may
originally in the Court, on the parties are now allowed trial by
jury.

Exceptions in any case are admitted only in civil cases. But
in criminal cases they are never admitted. In
mere actions of a civil nature, however criminal in form, ex-
ceptions may have been allowed.

Consent not required of the mother in an action of bastardy.

Of the liability of Parents to support each other:

Parent & grandparent and grandchild may be obliged on application made to the County Court, to support their child or grandchild being pauper; & vice versâ. This application may be made to the Justices in Sessions, by any of the parties interested, or by any neighbor of the pauper. The object of the memorial, which being disputed, the Ct. will call on all the parties concerned, both male & female, & charge them with the maintenance of the pauper in proportion to their abilities — not regarding the quantum of property which each may have received from the family estate. The Court then issue quarterly orders on the relations so charged. Wife then are not [illegible] mentioned, are issued against them in the name of the memorialist who becomes a trustee for the pauper. If a daughter of a pauper marry, her personal estate is not liable for the support of her poor ancestors. 2 Bac. 155.

If a man in C. marry a wife, he is obliged to maintain her children whether she was able to support them or not. He is also considered as entitled to their services. But this obligation ceases with coverture.

Of the liabilities of Parents for the contracts & torts of their Children.

Parents are, in general, liable for the contract & torts of their children (except for necessaries as relates to contracts of infants or tort 5) to the same extent to which masters are for their servants. It is not however to be understood that the rule of the parent's liability to provide his children, at all events, with necessaries, is absolute to masters; [illegible]

A tort is brought upon a contract made by either child or servant acting for the parent or master must be brought in the same manner as if the contract had been made by the parent or master himself.

The principal cases in which a parent is bound by those contracts of the child which are not for necessaries are the following:—

1. If a child is sent by the parent to contract for the parent; the latter is bound by the contract.

2. If the child has a general license to transact business for the parent.

3. If actually purchased by the child same to the parent's use.

4. If the child has a general license to transact business for himself. [illegible]

5. If the parent has occasion often entered into contracts made by the child; there is some difficulty in determining how far such occasional ratifications can render him liable in future. But,

5. The general principle of discrimination in this case appears to be, that if the debts contracted by the child are of such a nature, as that payment by the father affords good presumptive evidence of his approbation; he shall in future be bound by contracts made, or debts contracted, by the child, of a similar nature. But if the contracts made by the child are of such a nature, (giving debts for instance) as that payment by the father furnishes no rational presumption of his approbation, he shall not in future be bound in consequence of such payments.

Torts.

If a child in performing his parent's business commit a tort; the parent is answerable to the same extent.

But if the child while employed in the business of his parent commit a tort which is in no way connected with the performance of the business; the child not the parent, is liable.

An accident happens against which no diligence can guard; no one is liable for the damages.

A parent may justify an assault in defence of his child, & vice versa. But if either has made an unjust assault, the other will not be justified in retaliating, unless the safety of the one speedily requires interference of the other.

Education
& Children.

1 Bl. C. 450.

The English law has made it the duty of parents to give their children suitable instructions; but has no regulations to enforce performance of this duty.

In C. the chief magistrates of the several towns are authorized to take children from such parents as neglect their education & to put them under a suitable ~~instructor~~ master.

2d.

The child is entitled to all the profits which he acquires in any other way than by service; but what he earns in this latter way belongs to his parent, & his earnings be ever given to him by his parent, if such gift would tend to defraud creditors.

If the child has been beaten he himself is entitled to the damages; but the parent may have an action per quod, if he has incurred any expense in consequence of the injury done to the child; he may also recover that if it be specially stated.

3d.

The parent is entitled to any action for the deprivation (either in favour of a person standing in loco parentis, or otherwise) of his child's service; the original ground of his action was the loss of time & the expense incurred during his sickness. But though these two considerations still form the nominal gist of the action, they are not the rule, nor indeed the primary ground of damages. Mr. Wilkes, that a dollar not taking the loss of service be wrong but the decision might now be good. The age of the daughter in this case is not material, but since dig. to the Eng. authorities she must be nominally at least in the parent's service. In C. action of this kind have in some instances failed, where there was no seduction but merely loss of service.

This action has always been included in the definition of Trespass vi & armis. As to whether the action of it are actions on the case, &c. (see opinions as to actions of trespass, assumpsit, &c.) in case

The parent may have an action for the enticing of a child from his service.

1 Bl. C. 452.
1 Chit. Pl. 132.
2 Saund. 116.
1 Bl. C. 452.
1 Chit. Pl. 84.

2 Bl. C. 140.
2 Saund. 116.
2 Mass. 250.
3 Wheat. 181.
2 Kent. 253.
3 B. & P.
2 Saund. 116.
2 Bay. 105.
3 Burr. 1875.

3 Bl. C. 140-1. 2 Wils. 414.

Under whether this some analogy to the case of debauching a parent might not have an action for the alluring of his child into bad company, & the debauching of his morals.

Correction of Children.

The parent has a right to correct his child moderately; but it be exceed the bounds of moderation & discretion to be influenced in malice the child may have an action ag. him for damages, by his next friend. [illegible] the court to the hand over his children to him is negligent in correction, he is not immediate, the a mere error in judgment with regard to the correction of his child. The must therefore be left immediate correction, considering the nature of the case) — (Smalin, in order to subject the parent to damages, and the malice is to be inferred from the nature & circumstances of the fact it will always be inferred when the child is corrected for [illegible] which no rational person could think worthy of punishment. — The law is the same as to master & servants — [illegible] make slight & moderate correction, whether they be necessary or not. 1 Bl. C.

Post. 13. Law of the Domicil.

Qualifying a parent's power of [illegible] has not in many instances ceased to be [illegible]

The parent is the natural guardian of the child & of his estate; but it must account for the profits of the latter (by new York, 1 R.S. 88.) C. L. 88. 89.

In case of danger to the child's estate, the guardian who the parent or other person may be compelled in chancery to account, & before the child attains full age. In similar cases chancery may appoint another guardian in exclusion of the parent, or require the parent to give bonds to secure the child's estate & in case of refusal displace him. [illegible] the former cannot sue or alienate guardian while [illegible] living unless he is displaced.

2 Chit. 179. 1 Ves. 303. 2 Ves. 155. Moore. 338 Ambl. 385. 5 Mod. 223.

The parent has no right to extend any part of the child's property in his maintenance; the duty of the guardian 2 Kep. 230. But for any thing beyond necessaries maintenance and education the parent may also receive & dispose of the profits of the child's estate; having the privilege to mortgage for the child's benefit & the money disposed of for extraordinary purposes an action lies to recover it.

2 Vent. 353. Mym. 55 2 Pr. Wms. 18. 3 Atk. 393. 2 Ves. 44.

The power of the Chancellor in Eng. over the conduct of guardians is in this state vested in Chancery.

(But the power is by 3 Rev. Stat. 63.

guard.[n] in soc. is accountable to the ward, and hires 30.[?]

The guardian must pay interest for the money of his ward unless he can prove that interest could not be procured for it.

*And if a child capable in law of choosing refuses to make a choice, the judge [illegible] ward. Mk. [illegible] must appoint without his choosing.

If any part of the wards property in the hands of the guardian is lost by accident or misfortune & no fault or imprudence is chargeable on the guardian; the ward shall bear the loss. Co. L. 89.

When Probate appoints a guardian for a child under the age for choosing, the guardian thus appointed continues of course until the child after attaining that age chooses one, whom the judge approves.* Kirb. 251, 260. 33.

Co. Lit. 88. 2 Bac. 40.

Guardian in socage continues till the ward is 14 years old.

2 Bac. 41. Cro. Jac. 98. 2 P. Wms. 122. 1 P. Wms. 703.

Guardian in socage may bring an action in his own name for a trespass on the wards estate. 3 Com. 45. In this particular he differs from other guardians. Where there is guardian in socage it is also necessary, if the ward has personal estate to appoint another guardian; for 3 Com. 415. Co. L. 88. [illegible] the same person who is guardian in socage may be appointed to the other guardianship.

2 Wils. 129. 135. 1 P. Wms. 703. Vaugh. 179. 180. 4 Ab. Eq. 2. 15. 2 P. Wms. 110. 102. 3 Atk. 519.

Testamentary guardians are those appointed by deed or will of the father. These supersede guardians in socage, & retain their authority till the ward is of full age. Testamentary guardians cannot lease the wards estate. 1 Bl. Al. [illegible] as guard.[n] in socage. They may be bound in their wards to good behavior if they attempt an unlawful excess of authority. The power of appointing testamentary guardians is created in Eng. by statute; but this statute extends only to fathers. In the law of C. testamentary guardians are not known. See my Notes, p. 14.

2 Bac. 471. [illegible] [illegible] [illegible] [illegible] [illegible] [illegible].

Guardians in Eng. are appointed by the Ordinary Co. L. 89. No. 16. or Chancellor. Guardians appointed by either of these officers, are [illegible], required to give bonds for the security 2u. 1 Com. 231. 2 Salk. 177. [illegible] 13. 1 P. Wms. 703-6. 1 Har. N. 774. Ver. 163. of the wards estate, & they continue till the minor attains the age of fourteen. See my Notes, p. 14.

A minor having attained the legal age of choosing a guardian has not the absolute power of choosing whom he pleases; but the choice must be ratified before it has any force, in Eng. by the Chancellor or Ordinary: in C. by the court of Probate: and tho' the choice of the infant is regarded it cannot control. See Co. L. 89. 20. 16. See my Notes, p. 14.

~~Can a Court~~ ~~appoint Guardians~~ ~~Infants~~?

In Eng. if the father dies the mother is made guardian to her children; but if the court think it expedient another may be appointed in her stead. This is the case of males, but not in that of females: and both males & females may, when they attain the age of 14, choose guardians for themselves tho' the mother is living. The law in S. is the same except that there is no such distinction as has just been mentioned between the males & females, that the ages for choosing guardians in males & females is different, viz: 14 & 12.

But the law does the mother in the father's stead natural guardian to the children under the age of 14, or is not she a guardian in fact? as to this will depend on the statutes with respect to the passage-laws. That is, if the lands can by no possibility descend to her, she may be guardian in fact.

24th

In C. it is the duty of the court of Probate to appoint guardians for infants, who have no parents living under the age necessary to enable them to choose.

In Eng. an infant mortgagee may, on payment of the money loaned, reconvey the estate to the mortgagor. In C. this power is in the hands of the guardian by virtue of Statute. The guardian has authority to make partition of lands holden by the ward in common, joint tenancy & with leave of Probate.

A creditor of a minor, in order to obtain immediate payment, agrees to make a less sum than is due him, in satisfaction of his whole demand &c. the minor & not the guardian is entitled to the benefit of such composition.

Guardian is considered in chancery, as trustee; & whoever takes possession of an infant's estate, may be charged as guardian or trustee.

A guardian, having received property of an infant, is obliged to pay all debts & incumbrances charged upon the

3 Co. 89. no. 3. for nurture 12 14,

P.J. C. 488. Co. Lit. 88. Moor 738. 3 Co. 38. 3 Com. 417. 2 ... 3. - St. Laws 1 ... Co. Ch. Inst. Guardian ... 2. Co. 2. 83. n. 16.)

3 Burr. 1794. R. & H. 575. 3 Com. 422.

2 Com. 230. 2 Ch. Ca. 2nd. 2 Pro. 517.

1 Vern. 436. 1 Ch. 489. 2 Vt. 3. 38. 170.

2 Com. 23; 2 Fo: 2 Mo:

person estate out of just bounty. This rule is established to prevent the infant from any accident which might happen to his property, if it were put at interest, the guardian's profits enlarged in favour of the infant debts.

2 Com. 23;

The guardian has no power to put the ward's money out on lands; but it does not vest the land in the minor's name; still the latter, when arrived at full age may at his election, assent the land or demand the money. In the latter case however he is so entitled in Chancy to recover the land to his guardian. The manner in case of such a purchase by guardian, the ward dies having made no election; the executor is entitled to the money & his heir cannot claim the land.

2 Vern. 403. 433.

It is a general rule, that the guardian, in accounting with the ward, must have principal & interest; & tho' he is, in any case, obliged to pay over the ward's money when directed to be laid out in a particular manner; & instead of employing it accordingly & the direction, the guardian has used it in some other way to greater advantage; as in a commercial trade to himself. In this case as the minor may elect to take the money or the profits of the trade.

3 Vin. 529. 2 Com. 23.

Guardian & Ward. Ch. 44.

[illegible]

Co. L. 89. Ele 84. 2 Bac. 687.

But such losses or expenses as the ward might properly & could not be avoided or common prudence the guardian is not liable.

7 Ed. 42. 2.

The guardian, except he is also tenant is at bound the expense of maintenance, education &c. of the child, unless the expenses are very unusual & such as guardian would in general, says a decree, power or to educate the ward as his circumstances require.

Guardian in C. Mch. 1816 may account with the court of Probate, as well Chancery, & the latter will entertain jurisdiction of the original matter if it institute an account, & may order as in other cases.

2 Ch. 18.

And the guardian may also be punished in an action of account but as Chancy has a more extensive jurisdiction, in compelling the production of papers, & obliging the guardian to discover the

he wish before notice of his guardianship, upon oath. It has sometimes been the practice to resort to that only, in these cases.

Ecc. Cases. 58. 1 P. Wms. 111. 562. With regard to the marriage of minors, 7 T.R. 528. 3 Bur. 304. [illegible] a jurisdiction which has never been exercised by our Cts. of Probate. See notes. 151

Of the Settlement of Minors.

A foreigner can never gain a settlement in Eng. by his own acts. But if he has children, the place of their birth is the place of their settlement. 3 T.R. 362. 1 Str. 55? [illegible]

Generally the settlement of the father or of the maintaining parent, is the settlement of the child. 1 T.R. 459. 3 T.R. 1.4. If such parent acquire a new settlement, it immediately becomes the settlement of the child; and on the acquisition of a new settlement the old one is lost.* If the father & mother have no settlement, the place of birth is the settlement of the child. 3 T.R. 362. 1 Str. 55?

[illegible] 07. [illegible] 2 2. [illegible] 169. Str. 580. 1 Ld. Raym. 1332. 1473. 2 Sal. 528. [illegible]

A child may also gain a settlement of his own by [illegible] When his derivative settlement is [illegible] By gaining a settlement of his own, he is emancipated. 3 T.R. 356. [illegible] emancipated, [illegible] father may gain. 3 T.R. 355.

Ld. Raym. 1473. Str. 746. Bur. Set. Cas. 49.

The father being dead, the mother's settlement is that of the child [illegible] to emancipate [illegible] 3 T.R. 355. [illegible] 436, 53.

A widow by marriage gains a right of residing with her husband; but acquires no settlement for her children. This rule however, seems questionable on Eng. principles, so far as it respects widows who at the time of their second marriage, were able to support their children: for in this case the second husband is obliged to support them; & it would seem that they ought in such a case, to acquire a settlement. [illegible]

If the father has no settlement, & the mother has one of her own; her settlement shall be that of the children.* [illegible] Bur. S.C. 367. Bur. Set. Cas. 367. [illegible]

The wife by marriage gains the settlement of her husband if he has any: but if he has none, though she gains no new settlement she does not lose her old one.

Str. 683. 544.

In [illegible] the mother's settlement is that of [illegible] children.

[illegible]

35.

Of Master & Servant.

The different kinds of Servants are 1. Slaves; 2. Apprentices; 3. Menial Servants; 4. Day-Labourers; 5. Agents, Factors &c.

Slaves in C. if there are legally any such, differ from other servants only in the duration of their service. It has been doubted, however whether Slavery in C. has ever been duly legalized. If Slavery is legally introduced into C. its legality must be found in Statute or judicial decisions; for in the Common law it is entirely not warranted.

1. By Statute Sanction:— There is no Stat. in this State expressly warranting the holding of Slaves: But two Statutes one obliging masters to maintain their Slaves; & another the other emancipating at the age of 25. all who shall be born after the year 1784. have been thought to give an implied sanction to the practice.

In Massachusetts where the existing laws are entirely silent on the same as in C. it has been decided by the Supr. Ct. that there is no Slavery.

2. By judicial decisions:— The majority of the Judges of the Sup. Court in C. in several instances discovered their opinions to be, that Slavery in C. has been legalized: But there has been no adjudication on which has occurred, & settled the point.

It seems to be generally agreed, that an offender may be judicially condemned to Slavery for crimes.

It has been holden by our Supr. Ct. that the presumption is in favor of the Liberty of a white man. Quere, What of a Black? It has been decided, that a master cannot maintain trover for his slave, tho' he may for his goods he may be taken in execution. The court held that the action to recover a Slave now a third time must be the same as for the recovery of an Apprentice: and that it was

Tucker's Abr. 457. 3 Bac. 544.

Stat. Laws for 1715. c. 24. s. 2. 1784. c. 9. s. 2. 3 Bac. Abr. 355. Stat. 438. 831.

Dal. 555

[illegible] to the same rights as the rest of the men, with whom he [illegible] to intermarry.

The Civil Law seems considered the slave, all of whose rights are in the nature of an usufruct, about as the Christian law considers the custom of polygamy. They seem indeed to have gone on the ground, that slavery so far as it related to the master's rights to the perpetual service of the negro is legalized.

The court has also said, that a negro in slavery might recover freedom, qua for it be his inheritance. Upon these principles it would seem that a slave in C. might maintain an action ag.t his master. Indeed a negro has sued his master for selling him, & thereby separating him from his family: And tho' there was no adjudication, the Ct. privately advised his master to re-purchase him, & he did so.

26.

If the notes must be construed to be [illegible]. This seems a question on the Com. law as to the effect which marks in this case may have. Amer. Jurist 47.

2. Mod. 47.

Lutw. 1117. 1 Bla. R. 445.

Stat. 68.

2. Lev. 47.

Keb. 84.

3 Lev. 172.

2 Lev. 47.

Show. (5 ed.) 500.

1 Vern. 120. 3 Bac. 547.

Dougl. 710.

[illegible] the minor himself as a stranger: but as the minor himself is not in this case, a stranger to the contract, & not capable of making one, the question is, whether the contract thus made is voidable; & of course that he cannot be sued is not liable upon the covenants. In this case, however, the minor is the only person who has come into the case with other persons; & the master has all the rights common to masters, except that he cannot hold the minor to his covenants. As no state like that of slavery, as above mentioned exists in this state; minors cannot bind themselves by indentures of [illegible].

Eq. Ca. Ab. 128.

2 Eq. Ca. 688.

Eq. Ca. Ab. 688.

Lutw. 34

Dougl. 1 [illegible]

2 Vern. 5 [illegible]

Eq. Ca. Ab. 255.

The master cannot at Com. law assign over the [illegible] because a personal trust is reposed in the master by the parent, personal trusts are not assignable. The executor not being liable to perform the personal trusts of the testator is of course not bound to perform the personal trusts reposed in the testator; hence [illegible] are assignable or [illegible]

52.

prentice. Lev. 177.) That mauls [?] is bound to master sqr. to teach, to no case of apprentice is he instructed after masters death. denied. id. 267.

a dinner of wages good in a court and a [illegible] [illegible] 653. 1 [illegible]

Whether an executor of a master is bound to furnish diet, clothing &c. for the apprentice according to the covenant of the testator has been a question; & the decisions on this point are contradictory. But as clothing &c. are, in this case furnished, in consider.n of service performed by the apprentice; the executor, having no right to service ought not on principle to be liable. But if a premium is given with the apprentice, the executor ought either to provide for him after the master's death, or to return a proportional part of the premium.

3. Bac. 556-7.

Lev. [illegible]. [illegible] 257. [illegible] 210. Lev. 177. [illegible] 553. [illegible] 455. [illegible] 456. 2 [illegible] 518.

All that an apprentice earns by labour belongs absolutely to the master. And if an apprentice runs away & earn money; this money, or any goods purchased with it belong to the master; & may be recovered in an action of indebitatus assumpsit for money received, out of the hands of a third person. And an apprenticeship de facto is sufficient [illegible]. (See my notes, No. 16.)

Co. Lit. 117. [illegible] 93. 2 [illegible] 65. [illegible] 58. 2 [illegible] 126. [illegible] 683. 6 Mod. 69. 12 Mod. 415. 1 [illegible] 582. [illegible] 48. 83. [illegible]

The earnings of hired servants while in actual service belong also to their masters: But if a hired servant runs away & earns wages in the service of another, the master has no claim to the money thus earned; tho' he may have an action ag.t the servant for breach of contract, or ag.t the employer if he knew of the first retainer. [illegible] 117.

Co. L. 11. [illegible]

Do.

If a servant of any kind is enticed from his master's service, the person enticing is liable to an action on the case. A journeyman is a serv. within this rule. (Cowp. 56.)

Cowp. 60.

Menial servants may be hired by parol; and if no specific time is mentioned in the contract, the hiring is construed in the English law to be for a year. But in C. no such rule has been adopted.

Co. Lit. 42. & the [illegible] [illegible] according to this rule.

A promise made to a servant transacting his master's business, or to any one acting in the capacity of a servant is considered in law as made to the master; & an action may be brought on the promise in the master's name.

If a servant has been cheated, robbed &c. of his master's property; an action lies for the master, or for the servant if he brings his action first: But a recovery by one is a bar to the action by the other. [illegible] 127. The reason assigned for allowing the servant to maintain the action in this case are, that he is liable over to his master & that there is frequently a necessity of a [illegible] [illegible]

[illegible] 3. 3 Bac. 553. 6. [illegible] 673. [illegible] 303. 1 Mod. 54. 3 Mod. 283.

than can be exercised by the master: and so far as these reasons extend they seem satisfactory. But the adjudications have frequently been broader than the principle.

Money gained from the servant on an illegal contract may be recovered by the master. 3 Bac. 559. But if the servant squander or foolishly extend money with which his master entrusted him, it cannot be recovered.

If a servant in the performance of his master's business commits a wrong, the master is answerable in damages.± But if the servant when he commits a tort is not thus employed in his master's business, he not the master is liable. If the tort be by mere negligence, then in the case just mentioned when the servant is in the discharge of his master's business, the master is liable: if the tort is wilful, the servant himself is liable.

Formerly in Eng. if the sheriff's deputy committed a tort in the discharge of his office the sheriff was not liable: But now, he is liable civiliter yet not criminaliter. (Vid. 54) 1 Vent. 238. Cro. Eliz. 330. (55 Vid. 102. Cowp. 406.) Cow. 504.
For negligence of under-sheriff, sheriff is liable; under-sheriff not. (Cow. 403.)

In none of these cases however is there any necessity of suing the master if the servant is able to answer in damages; for he is always liable to the party injured, in the first instance. [except in case of contract] [illegible] committed tort [illegible] [illegible] committed. Amount of Master's Liability. [illegible] 3 Bac. 564.

for Contracts & torts on the contracts of the servant.

Whenever the contract of the servant binds the master it is considered as being virtually the contract of the master himself. This is the ground of the master's liability.

The liability of the master in this case cannot be destroyed by any private dissolution of the connexion between himself & his servant. [illegible] 1 T.R. 64.

For the negligence, mistakes, frauds & torts of the servant committed directly in the master's business the master is always liable, & sometimes the servant also; as will hereafter be explained. [illegible]

[illegible]

Margin notes:
[illegible] 3 Bac. 503. When y. master is liable [illegible] immediately injurious [illegible] case must be [illegible] 5 Bac. 525. [illegible] 235.#

6 Bac. 20. [illegible] 3 Vent. 235. 2 Sal. 441. 2 L.Ray. 738.

3 [illegible] 502-3. [illegible] master is liable [illegible] servant [illegible] 1 T.R. 702. 3 Bac. 560. Doug. 42.

[illegible] # [illegible] 43. 33.

[illegible] 2 Com. 643. 2 Ld. Ray. 224. 1 Shower. 95.

3 Vent. 323. 2 Sal. 382. [illegible] 91. Cro. Jac. 471. Com.

Sal. 35. Skin. 43.

2 Rol. 553. Cro. El. 181. 3 [illegible] 323. [illegible] 43. — The case in Cro. [illegible] 45 [illegible] 77 [illegible] not [illegible] [illegible] that master is liable for [illegible] [illegible] his servant [illegible] knows [illegible] found.

[illegible] a master [illegible] servant to [illegible] for [illegible]

3 Lam. 175 [illegible] the master is liable for [illegible] because [illegible]

[illegible] 553. Sal. 289. [illegible] the public. — A warrant [illegible] in transacting [illegible] [illegible] agents authority was [illegible] restrained

[illegible] 487. [illegible] masters have been [illegible] not liable for [illegible]

[illegible] 340. [illegible] 658. [illegible] 54. [illegible] their servants [illegible] [illegible] persons employed by [illegible] The action must be [illegible] employer. 3. 6 T. Rep. 411.

[illegible] master [illegible] [illegible] liable

[illegible] as the master [illegible] discrimination [illegible] [illegible] Whenever the fraud or injury committed by the servant in

Ld. Raym. 990. cont. his master's business is direct & intentional, the servant is always [illegible] liable as well as the master; otherwise it would [illegible] that the

6 Durnf. 25. 1 Bent. 10. 238. [illegible] Lay. 22. servant was a mere instrument & entirely [illegible] of his hand or injury. And in case of negligence [illegible] servant

[illegible] 58. [illegible] in transaction [illegible] not [illegible] a contract both

6 T. R. 411.

[illegible] master & servant are liable [illegible] [illegible] [illegible] servant [illegible] a [illegible]. But when

If servant buy goods which come to master's use, the latter is bound. (3 Rob. 625. Ld. Ray. 224. 3 Bac. 561. 3 Sal. 234) from the nature of the transaction a contract [illegible] [illegible] the master only is liable [illegible] [illegible]

in [illegible] [illegible]

[illegible] has been [illegible] in [illegible] that an attorney is not liable for a fraud or promoting [illegible] of his

1 Mod. 233. own client by [illegible] [illegible] [illegible]

[illegible]

3 Bac. 566. Coercion arising from mere [illegible] or from

Rol. 687. [illegible] not amounting to duress [illegible] will not [illegible] the [illegible] servant [illegible] [illegible] other [illegible].

Though in general the contract of the servant,

Yelv. 137. 1 Rol. 95. acting under the master's authority is the contract of

4 Durnf. 177. the master; yet where the servant, in transacting his [illegible] master's business makes an express contract of his own,

[illegible] 2 Rol. Rep. 270. Rol. Abr. 95. 3 [illegible] Rep. 57, the distinction between gen. & particular agents. 3 [illegible] 760. Mod. 109. [illegible] sup. a. text. & engages for himself, he is personally liable.

A servant may also in some instances be made

liable on his [illegible] contract [illegible] 4 T. R. 40. though acting for the

master; as where he does not use his master's name.

[illegible] When a servant wilfully cheats another, he

Cro. [illegible] was sued & made liable in damages: his master being sued by the servant for indemnification was holden to

be not liable.

[illegible]

[illegible] master [illegible]

[illegible]

+Vin. 247.
Master not liable for negligence of his servant for which the servant himself would not be liable.
Bac. Abr. Masters & Servants (I) 5.
Cro. Jac. 474.
1 Ld. Raym. 735.
10 Mod. 1 ?.

Leach 4th Edit. 4th Grant.
4 Ba. & C. 230.
5 Bac. 473.
4 Inst. 306.
Fawlet & Ld. Ch. Just. Eyre's Charge in Murder & Manslaughter 1 Hawk. P.C. 31. 38.

The rule of discrimen applies to this: that a servant intrusted to manage his master's business, & to act for him, does any injury thro' the want of those qualities he is liable to the master; but if he is not so trusted he is not liable. 10 Mod. 109.

3 Bac. 565.
1 Hawk. 138.

The Stat. of Mer. 5 has made this a felony in a servant, whether this Stat. is binding in C. is doubtful: but in general it is agreed not to be. (Co. Lit. 117.)

Some hold however that in cases of barratry the master may commence an action as soon as the barratrous act is done. 2 Bac. 33.

But if a servant make use of instruments to get possession of another's property, & then carries it away animo furandi, he is guilty of larceny. (East. P.C. 2 vol. 695.)

28.

+Vin. Abr. 374.
Co. Ent. 42. 93.
2 Ld. Raym. 1575.

+ 6. 46.
4 Inst. 3. 1. 1.
1 Hawk. 76.
3 Co. 2. 1 - 3
2 Inst. 283.

2 Mod. 107. 3 Bac. 566.

intentionally

Ca. Bac. 45. 42.

45 4. 42. 5

Ld. Raym. 360.

Vin. Abr. 2 vol. 314.
Ld. Raym. 360.
Bac. Abr. Masters & Servants (I) 5.
Cro. Jac. 474.
10 Mod. 62, 63.

Bac. Abr. Masters & Servants (I) 5.

Stra. 953.

ought

right

If C. no money is allowed for the payment of debts except those due to persons such as for the care taking, funeral charges &c. of the deceased. If the whole estate of the dec. is insufficient it is averaged among the creditors.

An executor, or administrator, C. can never claim more than he actually pays for more than he accounts for in the Court of Probate.

Courts of Probate have power even in case of insolvency to make some allowance to the executor of the personal estate; i.e. of plate, household furniture &c.

The executor cannot pay the payment of debts out of his own property, and settle it between himself and the unknown debts for the purpose of retaining those debts.

If the executor is appointed trustee for the payment of debts, or receiver, he has a right to retain for the payment of debts in preference to legacies. Wherever the executor himself is always considered as a residuary legatee. But now if any considerable property not absolutely vested in any particular purpose, is left to the executor; or if these can be collected from the will and intentions of the testator that the ex. should not be a residuary legatee; the case of Chamberlain v. Chamberlain is the case of an administrator. But in other cases it is left in the discretion of the Court whether the executor shall be considered as residuary legatee. The ex. in Eng. has no wages for his trouble.

If a creditor sue the ex. executor, have recourse to the residuary legatee, that is, if he has not paid the debts before he received notice of the creditor's demand, he is not liable to any one claim to the retainer from the deceased estate.

After payment of debts the residue is distributed according to the statute of distributions.

The words of distribution [illegible]

[illegible]

[illegible]

In the distribution of personal property, no distinction is made between whole & half blood. Co. Lit. 315. 323. 2. Bac. Abr. Tit. Descent. D. 5. Co. Lit. 14.

Law; The civil law in this respect is the same regarding property coming to it collaterally or lineally.

There is a determined & decided difference, that the whole blood shall take exclusively of the half blood; that is, the whole blood shall take to the exclusion of the half blood. Co. Lit. 14. 2. Bac. Abr. Tit. Descent. D. 5. 2. Bl. Com. 227. 1. Ves. 159. 3. Ves. 258. 4. Ves. 435.

The reason why in this case the whole blood shall take to the exclusion of the half blood, is because the former have a double tie to the ancestor, from whom the property descends, & the latter have only a single one. Co. Lit. 14. 2. Bac. Abr. Tit. Descent. D. 5. 2. Bl. Com. 227. 1. Ves. 159. 3. Ves. 258. 4. Ves. 435.

If the father of a person dec.d survive the mother take nothing; because whatever she might take would immediately go to her husband.

If after a divorce a mensa et thoro the father & mother be reconciled & live together, & it is doubted whether the father & mother being thus living, it is doubted whether the mother would be entitled to any thing or not. But as the father might to recover as he provide for his wife in this case, it would seem that she, if capable, should have a good claim. If the divorce was a mensa & thoro, she could not while her husband was living, claim any share of the personal property of her children, because the husband may by his property still continue: she after her husband dead, she might. And in all cases where the marriage was declared void, she is entitled to a share after the death of her husband.

The brother according to Civ. Law, succeeds to the exclusion of grandparents - uncles - & these the succession according to the common rules.

Children in order to succeed as heirs, are by the Civil Law, considered as being capable of taking property according to the rules of descent & distribution: and in case of their death an representation is admitted to take as heirs. Co. Lit. 12. Com. Dig. Tit. Descent. 2. 4. Co. 115. 2. Ves. 274.

31.

Of the distribution of real
Chattels real under the Statute of D.

[illegible] of the intestate, is declared
in the Statute of Frauds almost the same
manner as the distribution of personal estate
under the Statute. The limitation in the description
of consanguinity is in some measure the same
with that in the Statute of Distributions; but
it is materially different in the following
particulars, viz. in the Statute of Distributions
no person is admitted to any degree of kindred
but such as are descended from the blood of the
intestate's father or mother, or both; but in the
Statute of Frauds the blood of the intestate's
grandfather or grandmother, or any more remote
ancestor, is admitted to be the blood of the intestate
as well as that of his father or mother, and
the estate must be traced up to such ancestor
before any descendants from such ancestor can be entitled
to any share of the estate. Another material
difference between the Statutes is as follows:

"If real estate came by the intestate's death
to his brother or sister, or to the issue of his brother
or sister, and any of such persons shall happen
to be living at the time of the death of the intestate
entitled to the inheritance by virtue of the
Statute of Frauds as heir to such intestate,
every such person shall take the estate as
tenant in severalty, and not as coparcener,
of the ancestor from whose estate it came. If
no such person be living at the time of the death
of the intestate, the estate descends to the nephews
and nieces of the intestate, and to their children,
if all the brothers and sisters of the intestate
be dead, in equal degrees, and to be divided
per capita, and not per stirpes, that is, share
and share alike, as tenants in common, and not
as tenants in coparcenary, unless there be
a representation admitted among the collateral
relations, that is, unless the children of a deceased
brother or sister be admitted to take the
shares which their deceased parent would
have taken if living at the time of the intestate's
death."

2 Vern. 2. 222.

The words "real estate" in the Statute of Frauds
are construed to mean all such estate of which
the intestate was seised in fee simple, fee tail,
or pur autre vie, either in law or equity, at the
time of his death, and which descends to his heirs
and not to his executors or administrators.
But estates vested in trustees for sale for payment
of debts, and estates pur autre vie, whether
limited in the deed or will creating the estate
or by the Statute of Frauds, in case there be
no special occupant, go to the executors or
administrators, and not to the heir.

Estates tail are not within the Statute of Frauds,
because they are not devisable, and therefore
descend to the heir in the same manner as
before the Statute.

It is acknowledged in that the Statute of Wills does not exactly determine this latter construction: for if next of kin & the blood both respect the same person, as it really appears to be the case, we adopt the most obvious & common sense construction. The latter phrase is altogether superfluous, (inserted in the ~~ordinary~~) ~~ordinary~~ form of conveyance which is known as public counsel by lawyers. To make out the construction therefore it is thought that they are to be considered as importing two different persons: the former to the intestate & the latter to the ancestor from whom the estate came, thus: Next of kin to the intestate & of the blood of the ancestor from whom &c. Notwithstanding the objection to this construction it is conceived to be unavoidable from the words of the Statute & from other considerations. The reasons urged in support of this construction are the following:

1. The phrase "next of kin" when used by legal writers always refers to the Statutes.

2. The next of kin are the same that are intended for after brothers & sisters. But no ~~person~~ many instances, the brother & sister cannot be next of kin to the ancestor from whom descent is derived. The brother & sister are always to take in the character of next of kin & brother & sister, and could not be ancestor & cannot be next of kin to the ancestor or person from whom descent is derived. It would seem that the two phrases "next of kin" & "of the blood" were used to designate the claimants & ought to be so construed as to make sense. This construction: That the former does not refer to the ancestor & that the latter may 2 Bl. C. 230. S. Gon. no more than "of kin" relate to the intestate. And if the contrary construction were adopted it could be extended to the brother & sister, it would deprive them of the in many cases of the very persons, in behalf the Statute expressly meant to benefit them.

3. But if the brother & sister are excluded from the words from a sense of the actual sense of the words in most cases the intending people resulting to the Statute

makes exactly the same provision as is made by the [illegible] in Eng. upon the feudal construction of
Because, accord. to y^e construction, brothers & sisters are generally y^e only persons answering y^e description
the [illegible] of the blood; but of course in the case of the description of advancement by the words brothers & sisters is unnecessary.

+ [illegible] in the margin

In a subsequent clause of the statute it is enacted that if there are no brothers or sisters of the whole blood nor [illegible] of the intestate, [illegible] to go to brothers & sisters of the half blood; but it does not as the statute now stands go to their legal representatives. This is not conformable to the general rule, for in all other instances representation extends to the children of brothers & sisters. But so this is that the children of brothers of the half blood are totally excluded. But this it seems was not the intention of the legislature for we see in the original draught of this stat. before the [illegible] the term legal representatives was placed as referring to brothers & sisters of the half blood as [illegible] to the next of kin as at present.

[illegible] 354. 2 [illegible] 204. [illegible] 302. Thom. 134

The estates acquired by purchase in the limitations of the word [illegible] distributions in default of issue is next to brothers & sisters of the whole blood, & their legal representatives, then to the parents, then to brothers & sisters of the half blood (& their legal representatives) & then to the next of kin: those of the whole blood in each degree being preferred to those of the half blood. Representation extends no farther than to the children of brothers & sisters of intestate ≠ in England. — [illegible]

[illegible]

Creditors are to [illegible] to pay [illegible] & make distribution in the same manner as [illegible] intestate.

By [illegible] Car. II. where children [illegible] have a part of [illegible] advancement from the father during his life, shall in order to be entitled to a distribution [illegible] the estate of distribution [illegible]

[illegible]

bring what he has been received into hotchpot. This rule however obtains only in those cases in which the father dies intestate as to the whole of his property.

In the case of a child who has received any advancement from the intestate, being an advancement or legacy at his death is not required to bring it into hotchpot to be entitled to a distributive share; but such advancement or legacy is counted to the child as part or whole of his share.

At the death of the testator the inchoate right of the legatee commences, tho' the legal property of the legacy first vests in the executor. The same [illegible] legacy for payment of debts. The assent of the executor to a specific legacy, whether a real or personal chattel, vests the legal property in the legatee. [illegible] 2 Rol. 3?1.
Under [illegible] action lies at Com. Law — no action at Com. Law lies for a pecuniary legacy, upon a promise by ex. in consid. of assets. Cowp. 284. 289. — Secus, if no actual promise. 5 T.R. 690.

Donatio causa mortis is a present gift made by a person in contemplation of death. [illegible] if the donor recover the donee is not entitled to the property. If the donor dies the legal property of the donation vests immediately in the donee without the intervention of the executor or of any other person. To give effect to a donatio causa mortis there must be an actual delivery of the thing given, or some act amounting to it by the donor.

A gift of this kind is not good agt. creditors. [illegible] action lies agt. the executor in this case, he not being chargeable with the gift. [illegible] that the creditor who [illegible] of the donee must [illegible]
[illegible] administration [illegible] cannot [illegible] the donee [illegible]

It seems that a chose in action or a negotiable note may pass by a donatio causa mortis [illegible]
[illegible] the [illegible]
[illegible] may it not? or it may not [illegible]

[illegible] who [illegible] must be brought.

Ch. legacy [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Ves. 427. 135–6.
Ves. 80. 70.
2 Eq. Ca. Ab. 455
1 East. 120.
4 Co. 28. b. Str. 70.
2 Lev. 209.

Ves. 78. 77.

2 Atk. 35–2 12.
3 Ves. 14.
4 Atk. 2 4.
7 Ves. 431.
Ves. 153. 15?.
5 ?.

2 Ves. 206.

4 T. R. 401.

2 Cox. 381. Cox. #1 P. W. 333.

2 P. W. 237.

+2 P. W. 330.

33.

2 Ves. 644.

2 P. W. 610. 1 Ves. 501. 2 Ves. 109. 666. 3 P. W. 336. 3 P. W. 227. 2 Atk. 360. 3 Atk. 90. 1 Ves. 10. 3 P. W. 310. 1 B. & B. 380. 3 B. & B. 425. 3 Ves. 124. 2 P. W. 655. Ram. 163 &c.

203.
1 Vern. 138. / 1 Vern. 55. / 5. 55. / 2 Vern. 25. / 3 P. W. 3[illegible]

A legacy to a wife or other person entitled to maintenance from the testator, or under a marriage settlement, is generally considered as intended to be a satisfaction of what is then due; & tho' the legatee may have her election as to which she will take she cannot have both.

[illegible] Ch. 263. / Vern. 4[illegible] / Vern. 115.

A gift to a legatee [illegible] is to be considered in part of the legacy [illegible] the will made previous to such gift.

Legacies may be divided into vested & lapsed.

[illegible] 205. / [illegible] by [illegible] of a cond. [illegible] / 2 Vern. 3[illegible]

The [illegible] to [illegible] the [illegible] will go [illegible] of [illegible] [illegible] two [illegible] +) Decided [illegible] gift [illegible] after the death [illegible] living [illegible] not [illegible] legacy.*

[illegible] Ch. 470. / Vern. 20. / [illegible]

A legacy may be made with a proviso that if the legatee die before the testator, [illegible] or [illegible] it shall go to another [illegible] [illegible]

[illegible] 342. / [illegible] 41. / [illegible] / [illegible] Ch. 21. / [illegible]

A legacy given to [illegible] at a future time [illegible] 3 Dyer f. 43. legacy to be paid [illegible] is not vested till he arrives at that age. But [illegible] before the time [illegible] it becomes a lapsed legacy. But for a legacy made in the same manner [illegible] (2 [illegible])

If a legatee dies before his testator his legacy is lapsed. { Devises 13. 4 [illegible] 60. / Butler's [illegible] }

[illegible] 332. / [illegible] 270.

+ Chancery [illegible] the [illegible] legacy [illegible] if the legatee dies before the day of payment, the heir will take [illegible] in the [illegible] [illegible] (2 Atk. 275.)

[illegible] / [illegible] 86. / Vern. 20. / [illegible] / Vern. 20.

Legacies to which [illegible] are annexed [illegible] in restraint of marriage [illegible] restrictions as to a certain class [illegible] But a legacy left on a description [illegible] husband having a family [illegible] to his wife [illegible] [illegible] her children.

[illegible] 28. / [illegible]

Conditions in restraint of marriage after a certain [illegible] [illegible] also a restriction agt. marrying a Papist.

1 Cont. 179. — [illegible] given on condition of being forfeited if the
1 Atk. 502. — legatee marries without the consent of a particular
3 P. Wms. 503. — person are not subject to forfeiture unless limited to ano-
[illegible] 249. 282. — ther upon breach of the condition. (Does not this [illegible] all the conditions [illegible] mentioned in [illegible])

[illegible] A legacy given to several [illegible] to vest in the sur-
[illegible] vivors if either of them dies before marriage and before the age of 21; but not otherwise.

[illegible] If a legacy is paid by an executor to the father of an infant legatee, it is at the risque of the ex— but not if paid to any other [illegible]. [illegible] any of the guardian [illegible] [illegible] discharge [illegible]

[illegible] If no time is appointed by the testator for the payment of a legacy, it is payable at the end of a year from the testator's death.

[illegible] A legacy is payable to the representatives of a deceased legatee at the time originally fixed for payment.

The person who is entitled to a [illegible] legacy may
2 [illegible]. 31. — demand payment immediately after the death of the
283. — first legatee; provided [illegible]

[illegible] If a legacy is demandable at the end of a year — Qu. whether [illegible] Atk. 415. 3 Bro. 160. Rich. 161. — it commences from that time. In case of a [illegible] 1 Ves. 319. 2 Bro. 251. 3 [illegible] 130. SS [illegible]. 30. after a [illegible] demand — [illegible]

If a legacy is appointed by the testator himself to be paid at a time certain, it is not [illegible] whether interest from the time so fixed or from the
[illegible] Atk. 415. — time of the demand; but modern authorities favor
[illegible] 11. — the opinion that interest commences from the time
161. 3 Bac. [illegible] — of the demand. [illegible] 3. [illegible] 2 [illegible] 10.

[illegible] If a legacy is made payable to a child of the
[illegible] — testator even at a future time and no provision
[illegible] — is made for its maintenance, it will carry interest
from ~~[illegible]~~ [illegible]

By the Com. law money made payable at a [illegible] day bears interest from the time fixed for payment.

[illegible] If a testator [illegible] [illegible] [illegible]
[illegible] 3 [illegible] 10. — [illegible] ± ✻
±1 [illegible] 5. — [illegible]

Where the personal funds in the hands of an ex. or ad. are insufficient to pay the pecuniary legacies, each legatee must contribute rateably, according to the amount of his legacy, and not of the assets.

Cal. 410.
2 P. Wms. 392.
3 Bro. C. C. 357. n.

The law favours the payment of pecuniary legacies.

Pecuniary legacies are bequests of money: the testator's intention in bequeathing a certain sum of money, is clear and unambiguous, and the terms used do not admit of any particular description. Jon. 388. Pre. Ch. 340. 3 Atk. 385.

Pecuniary legacies are liable to annuities, debts, &c.

2 Vern. 406. Principle.

Specific legacies are not liable to annuities, debts, &c. when the personal estate is sufficient: but if a part only of the personal estate be taken for payment of debts, the legacies are not taken in proportion. Cas. t. Talb. 287. Hence, to make a reasonable provision for annuitants, the whole personal estate must be taken in proportion.

Principle however, obtains only when it is necessary to take part of the specific legacies: for if the ex. take any legacy of his own, he is not liable to any diminution of other legacies; he is liable for the amount of the legacy so taken.

Prin. D.

If a specific legacy is lost or destroyed, or any incumbrance be created by testator upon it, before the assent of the ex. to the legatee to whom it was given, such legacy abates.

2 La. Ca. 342.

If the whole of a personal estate, also a particular portion of it, be specifically bequeathed, and the assets are insufficient to pay all the legacies, the specific legatees are entitled to abate with the pecuniary legatees in proportion to the amount of their legacies, from which deduction is made the value of the specific legacy.

2 Ven. 358. 2 Vern. 205. Prec. Ch. 287.

The ex. is not obliged to pay any legacy till the expiration of one year after the testator's death, unless the personal estate be sufficient to pay all debts, legacies, and annuities.

Hil. 5 Geo. 2. Vern. 94. 460.

The time is directed by the Statute of Limitations for the exhibition of actions by the creditors of the deceased, to commence from the death of the testator.

The legatee of an annuity or legacy is not given any remedy against the land for the arrears thereof, but is to come in pari passu with the other creditors.

[illegible] 260. 2 [illegible] 3. a [illegible] 211. ≠ vid. 79.

The rule last mentioned does not however [illegible] of the ex. when he paid the legacy was ignorant of the ex = istence of debts [illegible] [illegible] [illegible] [illegible]. [illegible] 187.

2 [illegible] 193.

A creditor may [illegible] somehow the assets of his debtor in the hands of a legatee, [illegible] insolvent [illegible]

[illegible] duty of the ex. to [illegible] assets for the payment of debts [illegible] to [illegible] returns.

[illegible] If the executor having thus [illegible] assets becomes a bankrupt, [illegible] before payment [illegible] doubtful whether the creditor [illegible] the assets in the hands of legatees [illegible] [illegible] [illegible] on principle [illegible] that the creditor [illegible] [illegible] [illegible] the assets [illegible] [illegible] [illegible] that the creditor [illegible] [illegible] [illegible] all the legatees [illegible] that [illegible] demand [illegible] [illegible] [illegible] [illegible] es.

Dy. 264 [illegible] 3. [illegible] 145 [illegible] 3.5. 5 [illegible] 6.0. [illegible] 265. 6 [illegible] 26.279. 2 [illegible] 3. [illegible] ≠ [illegible] 36 [illegible]

[illegible] 3. Bac. 488-9. Comyn. 284. 283. 291. 292. 1 H.Bl. 108. 7 T.R. 667. 8 T.R. 593. 3 [illegible] 129. 5 T.R. 692. [illegible] Rolle 233. 4 Ves. 9. 19. [illegible] [illegible] [illegible] [illegible] [illegible] But neither in [illegible] can the legatee recover [illegible] (#1260) [illegible] [illegible] [illegible] [illegible] [illegible] 364 [illegible]

Of [illegible] [illegible]

[illegible] 233. 1 [illegible] 03.

[illegible] [illegible] 104.) [illegible] 3 [illegible]

In accidental ‡ [illegible] a legacy [illegible] [illegible] the testator [illegible] [illegible] [illegible] [illegible] [illegible] the testator [illegible] [illegible] [illegible] testator intended [illegible] [illegible] [illegible] But if the legacy [illegible] [illegible] testator [illegible] [illegible] [illegible] no ademption. [illegible] [illegible] [illegible] testator [illegible] [illegible] [illegible] [illegible]

5 [illegible] 08. [illegible] the testator [illegible] [illegible]

Bac. 445.

c. 42. 377.
Black. 164.
Lyb. 47.
Ld. 3. 2. 3.3.

Ld. 122 a.
15. 40 a.
126. 2 a.

Ld. 50 a.
Ld. 34. 1 a.
42.
Bac. 411. 418.
a.
42. 1 a.
Ld. 2. 3. 27. 8.

An enquiry may always be made into the consideration of bonds when the persons are interested.

Commissioners of the estate of a deceased person in C. chancery have a power to enquire into the case of the debtor, and the original consideration of the bond, not voluntary though not mentioned in the recital of it, and to report the same; but such enquiry would prevent the obligee from making use of the bond, as the same cannot be made in a summary way, but subject to be controlled by the parties.

Ord. 88.

In C. general creditors bring bills.

Ord. 5.

Bills are brought by the heir, executors or administrators against the heir, devisees, and creditors by specialty. But statute or other debts there is no direction in the decree to enquire into the consideration of the bond, unless it be expressly mentioned in the bill.

Note: upon an average taken on an implement of war, for damage to the ship, the owner is not entitled to recover against the underwriters, but may include according to 33 Geo. 3.

Where in C. during a replication to rebut the answer, the bond is proved for that purpose only, and after the decree the bill is dismissed, the decree is not conclusive in the same court. In such a case the right of the general creditors according to the average paid to other creditors. But the judgement was reversed in the H. of Lords, and decreed that the bill should stand dismissed with costs.

This determination appears to have been overruled. Vide 2 Ves. 331.

Ves. 331.

It has been held that the bond creditors have no authority to give judgement for an average payment in these cases. But that the business belongs to Probate. M.C. judges. That the Act does not contemplate any meeting in the case of making the discovery of new estate; but that a new proclamation is the only means directed. It must be executed by the ex. That a new average must be made. That the new creditors of his claim should be by commissioners, authorized to examine it, is necessary to be done before paid to the creditors to take an average from the remainder.

If the ex. applies to increase, must discover his estate, assuming it to be the whole as it is liable in bonds.

3. Inst. 2.
Cap. 3.
Mirr. Chaps. 140.

Ld. Raym. 33. 24.

Co. Litt. 351.

Ld. Raym. 24.

Co. Litt. 351.

Ld. Raym. 1176.

Ld. Raym. 2 To.

Lilm. 469.
Litt. 33.
Co. Litt. 3 b.
3. Inst. 21.
3 Co. 3. 310.

Co. Litt. 501-2.
Com. Dig. 452.
4

Ex. 43.

Ex. parte Bolton. Ex parte Bolton.

Bolton & Co. 438
16 Ves. 240.
Ves. 54.
Fonb. Eq. 173.

By the old practice it was doubtful whether a creditor could be admitted to prove after the time appointed by the commission. But now the practice is settled. The reason assigned for permitting the creditor in this case to prove after the time appointed is that he could not be charged with laches, as he was not bound to attend the commissioners, unless he should receive notice to prove his debt.

Ex. 920.
Ves. 160.
Bac. Abr. 373.
Ves. 335.
Ves. 54.

The exception to the rule of distribution is founded on the idea that he is entitled to the repetition of money paid upon a bill of exchange, as would the right of the creditor to claim his debt after such an event.

Ex. 50. 237.

A stranger has the right to the repetition in case of a voluntary payment, but the burthen of proof is on the debtor that the creditor received the money. Proof is admissible to show that notwithstanding the receipt the debtor intended that the creditor should have the money, but such proof is not to be favored.

Ex. 50. 427.
Ex. 68. 223.
Ves. 40.
Ves. 31.
Ves. 313.
Ves. 403.
Ex. Ch. 201.
Ves. 62.
Ves. 24.

The general rule is that in order to prove a debt proof is indispensible to rebut an equity to retain implied in law, i.e. that proof must be adduced to establish the old legal implied of a valid instrument, when such implied cannot arise from the equitable construction. Yet such proof cannot in this case be admitted to establish the equitable in contradiction to the strict legal construction. But the former must be collected from the instrument itself.

39.

The creditor of a creditor will be barred in the same

3 Bac. 500.
3 Bac. 3.
Eq. 207-8.
Com. 275.
L. 35. 335.
Addit. 230.

Ch. Chatterton v. Watson, 1 Devonsh. Rules Cases, 1.
C. in an action on Policy of Insurance to recover the amount of the Policy.

Held that, assuming that on the facts stated in the Case the Plaintiff was entitled to recover, yet that the Plaintiff could not maintain the present action.

B. 506.
Contra.
Ab. Ca. 14.
Al. 311. 312.
3 Bac. 335.

For the Plaintiff it was argued that the Defendant was an underwriter, and that the Plaintiff, having insured the ship, had an insurable interest in her, and that the Defendant, having undertaken to indemnify the Plaintiff against all losses, was liable to pay the amount of the Policy, as soon as the ship was lost, without waiting to see whether she might not be recovered.

Eq. to y^e words subjunctive x^s. Ib. de bono usque, see 1 Saund. 219-219 y^s. (k)

Cp. Dr. v. Stanwick (1 Saund. 219-219 y^s. (k)).

But it was contended, on the other side, that the Plaintiff could not recover, because the ship was not lost at the time when the action was brought; especially as a considerable part of the damages sustained by the Plaintiff consisted of the charges incurred by him in endeavouring to get the ship off the ground, which charges could not be recovered in this action. It was also said that the Plaintiff could not maintain this action, because the Defendant, as underwriter, was entitled to have the ship delivered up to him, in case she should be recovered.

[Cp. 1 Saund. 219 n. (k) as to the meaning of the words "usque ad primum mercatum post" &c. Cp. 3 Bac. Ab. 335.]

The question is, whether a declaration on a Policy of Insurance can be supported, where the ship is not lost at the time when the action is brought, although she may afterwards be lost before the commencement of the suit.

If there are two Defendants, one is not liable for a loss occasioned by the other, unless it is done in pursuance of a joint contract between them. For a declaration is in the nature of a writ of trespass.

Chan. 320.

If after the Defendant has paid the money to the Plaintiff, the ship should be recovered, the Defendant may file a bill in Chancery, and obtain a decree against the Plaintiff for the money. But if no effects are found, the Defendant will be relieved at law. But if the Plaintiff should go against the Defendant, and recover the whole amount of the Policy, the Defendant will be entitled to the ship.

Cp. 1 Saund. 218. n. 114.

If both the Defendants have paid money to the Plaintiff, they are both liable to an action, but the money received by the Plaintiff belongs to the Defendants.

86.

[illegible]

[illegible] Administrator['s] Bonds.

[illegible]

[illegible]

40. [illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible] that the real [illegible] title of the [illegible] [illegible] not [illegible] the [illegible] of [illegible] [illegible] distinctly [illegible] judgments is divided into three branches: 1. the case of a naked [illegible] 2. of [illegible] [illegible] — 3. of [illegible] [illegible].

[illegible] entrusted by one man to another

3. 54[illegible]. — 2. 555[illegible]. [illegible] 253. [illegible] 55. [illegible] 640. [illegible] [illegible] 135. [illegible] 135. [illegible] The purchaser of such property from the bailee shall in some cases be good agt. the bailor & in others not so. [illegible] [illegible] If goods are left in a condition in the possession of the bankrupt, & the debtor sells, [illegible] the title shall [illegible] not [illegible] the actual owner [illegible] [illegible]. The reason assigned for this rule is that the creditors [illegible] had confidence in the bankrupt, & holden him up in false colours in point of property. Where the [illegible] [illegible] no confidence [illegible] [illegible].

[illegible]. 44. [illegible]. 348. [illegible]. 55. 21. A horse sold by one to whom he had been lent to ride a few miles may be taken by the original owner wherever he may be found. So jewels [illegible] in whose custody they had been lodged for safe keeping may be reclaimed by the original owner.

Cattle, entrusted to a person to be driven to a particular place & then driven to another place, & sold, may be recovered by the real owner.

[illegible]

[illegible] 3. [illegible] 80. 3 [illegible] 238 [illegible].

[illegible]

[illegible] 3 [illegible] 233. 2 32. [illegible] 5 [illegible] 495. 7. [illegible] 3. 579. [illegible]

[illegible]

[illegible] 3 [illegible] — [illegible] 3 [illegible] [illegible] not [illegible] 216.

[illegible]

[illegible]

If one builds the house of another, the bailee must [illegible] Cause diligence to be taken of the corbeau to be carried back to the right owner: But if at the time of the omission the legislature was known to demand this, the bailee would, perhaps, be answerable to the legislature.

If the wife of a bailee becomes [illegible] of which was built on his estate, who did not, the owner of the house, it is said that the wife comes to the possession of the bailee, by act of law, he must declare it to the real owner.

3. Lending gratis — bailee for hire — & the ordinary of a servant to carry for hire, Mk. includes under one general head of bailment, giving the bailee in these cases the same reasonable degree of diligence.

In all these cases of bailment the bailee is not liable, answerable for negligence, but not for any accident or misfortune which does not appear presumptive evidence of negligence. The law does not require [illegible] the utmost possible care, as most such are & diligence are usual in such cases by such as the bailee is known to be. But the same understanding & skill is not to all persons.